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FINANCIAL RESPONSIBILITIES UNDER RCRA

ORIGINAL

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCE, TRANSPORTATION, AND TOURISM

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 3692

A BILL TO MODIFY THE DEADLINES APPLICABLE TO HAZARDOUS WASTE DISPOSAL FACILITIES REQUIRED TO CERTIFY COMPLIANCE WITH CERTAIN FINANCIAL RESPONSIBILITY REQUIREMENTS UNDER THE SOLID WASTE DISPOSAL ACT

COMPLETED

NOVEMBER 13, 1985

Serial No. 99-82

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FINANCIAL RESPONSIBILITIES UNDER RCRA

WEDNESDAY, NOVEMBER 13, 1985

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE,
TRANSPORTATION, AND TOURISM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2218, Rayburn House Office Building, Hon. James J. Florio (chairman) presiding.

Mr. FLORIO. The subcommittee will come to order.

Mr. Lent is on his way, but in light of the fact that we are required to vacate the room for a CIA hearing at 12:30, I think it is appropriate that we get underway so we can conclude the hearing on time.

I would like to welcome all in attendance to an extremely important hearing dealing with a current problem that is on top of us literally.

In 1976, Congress passed the Resource Conservation and Recovery Act which required the Environmental Protection Agency to develop a permitting procedure for hazardous waste facilities. As part of that act, Congress included a provision allowing existing facilities to operate under a short-term or interim permit until a final permit was issued. The interim permit, and I think this is important to emphasize, was intended to be nothing more than a temporary administrative mechanism while the EPA drafted regulations for final permits.

I know some of these permits were literally sent out in the mail as a result of telephone requests. It was not until 1980 that EPA even began setting out the requirements for a final permit. In fact, it took the EPA until 1982 to finally issue permitting standards for land disposal facilities and even then it complained that those regulations were promulgated under court order "ahead of the schedule which the Agency had desired . . . ." Today, 9 years after the passage of RCRA and the requirement for final permits, EPA has reportedly issued final permits to only eight land disposal facilities. Meanwhile, the EPA reports that at least 1,575 facilities continue to operate under the interim permits.

The concerns that we hear today deal exclusively with the question as to whether there has been compliance with the interim permit standards which, as we will see, are extremely modest. These minimum requirements have been widely ignored.

EPA has done literally nothing to enforce those modest interim permits that have been in existence since 1980. A 1984 GAO report

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documented widespread noncompliance, finding that well over half of the disposal facilities that I indicated before numbering approximately 1,500 were not complying with the modest interim permit requirements.

Last year, out of sheer frustration with EPA's effort, the Congress required compliance with ground water monitoring and financial responsibility within 1 year. Let me make it clear that these two requirements do not guarantee that hazardous waste disposal facilities be safe or not leaking. All they require is that there be wells to determine if there are leaks and that owners have the financial ability to respond if problems occur.

I want to emphasize that one can be in full compliance with the interim permit requirements of ground water monitoring and financial responsibility requirements and still be leaking and not been in violation with any of the laws.

As a matter of fact, we will hear from some of our witnesses that a substantial number of those facilities that are maintaining that their only difficulty is the inability to obtain insurance have been documented as leaking today as we sit here now.

Only a few days before the November 8 deadline, EPA informed Congress that some facilities could not demonstrate the necessary financial responsibility requirements, and suggested that it was up to Congress to do something to address the problem. Although the number of facilities affected is relatively small—EPA estimates 50 facilities in total compliance with everything but the financial responsibility requirements, I am concerned if there is a problem with legitimate, safe disposal facilities simply being unable to demonstrate financial assurance under EPA regulations.

A preliminary survey by the subcommittee, which I would like to insert into the record, raises considerable doubt as to the reliability of the information we have received so far. EPA has provided us with a list of 35 facilities that it says have adequate ground water monitoring but could not meet the financial responsibility requirements by the November 8 deadline. We have conducted an independent survey of the list given to us by EPA contacting as many of the facilities as possible and in this case, it comes to 27 of the 36 facilities. We have contacted those facilities and have found that as of now, only 5 of the 27 of the 35 still have the problem that we are concerned about, that is full compliance with everything else but the inability to comply with financial responsibility. The rest have either found alternative means of disposing of their wastes, met the financial test, or have found insurance.

Again, to reinforce a point that I made earlier in my remarks, of the 35 facilities that maintained at one point that they were in full compliance with the regulations except for the financial security requirements, 22 of those 35 have been documented as having ground water contamination on site. The obvious question that is raised is maybe they can't get insurance because they shouldn't get insurance because the problem is there with regard to ground water contamination.

This preliminary survey does not in any way deny the existence of a real problem, but it does raise serious questions about the reliability of the information we have received so far from EPA as well as the extent of the crisis that we are supposed to be in.

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Current regulations provide only two means for a company to demonstrate its ability to deal with liability claims; that is, the financial responsibility requirements—environmental insurance or proof of considerable assets to cover potential claims. We all know that insurance companies are not selling all kinds of insurance including environmental insurance. We also know and this committee has had hearings on the fact that this is not a problem unique to the environmental field; it is a problem across the board that the insurance industry is experiencing, but it took EPA until August 21, 1985, to initiate a proposed rulemaking to change these liability requirements so as to have them more expansive so as to allow companies to meet financial security requirements without the need to have insurance.

I am talking about indeminification agreements, utilizing assets of companies that are in the chain of ownership, that is many of these companies are subsidiaries of substantial companies and it may be that assets can be used or transferred to meet some financial security requirements.

Many of us were hopeful that the agency would adopt additional means of determining financial responsibility before November 8 to allow companies to respond to the insurance problem.

I don't think this is unreasonable because the regulations have been in effect over 5 years. The Congress put everybody on notice last year that we were serious about law enforcement and therefore the hope was that there could be an expansion of the definition of financial security to allow companies that are operating in every other respect in compliance with the law to take advantage of alternative financial security capability.

On October 18, 1985, keeping in mind that the deadline is November 8, only 3 weeks before the deadline, the Administrator of EPA, Mr. Thomas, sent a letter to Congress stating that the agency planned to develop new rules, but that it "will not take any regulatory action on this matter before the November 8 deadline."

If EPA is unable or unwilling to develop a regulatory system with sufficient flexibility to allow legitimate, financially viable disposal companies, the opportunity to remain in business, then we in Congress should be prepared to act. We are going to want some specific recommendations from EPA.

We are pleased to have some representatives from EPA here today. It is my understanding that EPA is in the process of a rulemaking procedure, but Mr. Thomas doesn't think it can be completed. Obviously it hasn't been completed by November 8.

We are pleased to enact by statute provisions that should be dealt with by regulation if we are called upon to do that but we want some specific direction from EPA so as not to be duplicating what they are doing. I think it is unfortunate that this situation has occurred. Unfortunately, it is illustrative of some of the problems that the American people have with environmental protection over the last number of years.

I suppose I will sum up by saying this is reported to be a crisis, a crisis that is on us and now the Nation is aware of it. Notwithstanding the fact that the laws and regulations have been on the books for 5 years, the Congress has stated that they were serious

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that that law had to be enforced a year ago and yet we meet today ostensibly in a crisis situation and that is particularly unfortunate.

We have two of our Members of Congress who are here who are willing and anxious to testify before us. I would ask Representative Smith to come forward and Representative Johnson to come forward.

We are pleased to have you both before our committee. As with all our witnesses, your statements will be put into the record in their entirety.

[The survey referred to and the text of H.R. 3692 follow:]

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U.S. House of Representatives
Committee on Energy and Commerce
SUBCOMMITTEE ON COMMERCE, TRANSPORTATION, AND TOURISM
Washington, DC 20515

PRELIMINARY SURVEY OF EPA DATA
BY THE SUBCOMMITTEE ON COMMERCE, TRANSPORTATION AND TOURISM

The following list of 35 facilities was provided by the Environmental Protection Agency.

NO INSURANCE: ADEQUATE WELLS

The status of the ground-water monitoring systems is based upon information obtained by the Dingell survey last Spring. Some well systems have been upgraded since that time, but this data does not reflect any changes that have been made.

1. AL Courtaulds North American
2. CT Harper Leader
3. GA Production Plating
4. IN Midwest Steel
5. IN Adams Sanitary Landfill
6. KS Williams Pipeline
7. LA Colfax Concrete
8. MS Vertac Chemical
9. MT Transabas Inc
10. OH NCR Corporation
11. SC Roy Metal Finishing
12. SC Stoller Chemical
13. TN Sanymetal Products
14. TX Texas Electric Cooperatives
15. OH Fei land Farm #2
16. AR Tosco
17. CT Birken Manufacturing
18. CT Plainville Electro-Plating
19. FL A-AAA Printing Ink Company
20. LA Madisonville Wood Preservers
21. MI Buckeye Products
22. MI Quanex Corporation
23. MS First Chemical Corporation
24. MS Rogers Rental Landfill
25. NC John boyle & Company

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No Insurance: Adequate Wells Cont'd
Page Two

26. NC Galvan Industries
27. ND Flying J.
28. OK Chemical Resources
29. OK Oklahoma Refinery
30. TN Langdale Company
31. TX Texas Electric
32. TX Ohmstede Works
33. TX Gary Aircraft
34. TX Sigmor Refinery
35. VA Wheelabrator Frye

The Subcommittee interviewed by phone 27 of those 35 facilities between November 7, 1985 and November 12, 1985. The results of those interviews are described below:

FACILITIES THAT MET THE FINANCIAL TEST

1. IN Midwest Steel
2. OH NCR Corporation
3. MS First Chemical Corporation
4. TX Texas Electric
5. VA Wheelabrator Frye
6. IN Adams Sanitary Landfill

FACILITIES THAT OBTAINED INSURANCE

1. MI Quanex Corporation
2. MS Rogers Rental Landfill
3. TN Sanymetal Products

FACILITIES THAT NOW USE TREATMENT OR OFF-SITE DISPOSAL

1. CT Harper Leader
2. GA Production Plating
3. KS Williams Pipeline
4. CT Birken Manufacturing
5. LA Madisonville Wood Preservers
6. NC John Boyle & Company
7. MS Vertac Chemical
8. MT Transabas Inc
9. SC Roy Metal Finishing
10. SC Stroller Chemical
11. OK Oklahoma Refinery

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FACILITIES NO LONGER IN RCRA PROGRAM

1. AL Courtaulds North American
2. MI Buckeye Products

FACILITIES COULD NOT OBTAIN INSURANCE AND HAVE NO DISPOSAL ALTERNATIVES

1. LA Colfax Creosote
2. TX Texas Electric Cooperatives
3. CT Plainville Elctro-Plating
4. OK Chemical Resources
5. TX Ohmstede Works

The remaining facilities could not be contacted. OH Fei Land Farm #2 and A-AAA Printing Inc Co. did not have listed phone numbers. AR Tosco and TX Sigmor Refinery were not listed on the masterlist provided by EPA to the Subcommittee. ND Flying J and TX Gary Aircraft did not answer at the listed phone number. And TN Langdale Company did not return calls.

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99TH CONGRESS
1ST SESSION

H. R. 3692

To modify the deadlines applicable to hazardous waste disposal facilities required to certify compliance with certain financial responsibility requirements under the Solid Waste Disposal Act.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 6, 1985

Mr. BROYHILL (for himself, Mr. TAUKIN, Mr. LOTT, Mr. SHELBY, Mr. GINGRICH, Mr. DOWDY of Mississippi, Mrs. JOHNSON, Mr. NICHOLS, and Mrs. SMITH of Nebraska) introduced the following bill; which was referred to the Committee on Energy and Commerce

---

A BILL

To modify the deadlines applicable to hazardous waste disposal facilities required to certify compliance with certain financial responsibility requirements under the Solid Waste Disposal Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CERTIFICATION OF COMPLIANCE WITH FINANCIAL RESPONSIBILITY REQUIREMENTS.

(a) EXTENSION FOR CERTAIN FACILITIES.—In the case of a facility described in subsection (b), notwithstanding the failure of the owner or operator of the facility to file for

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the determination and make the certification referred to in section 3005(e)(2) of that Act, the interim status of such facility under section 3005(e) shall not terminate on November 8, 1985. The interim status of such facility shall terminate 4 months after the enactment of this Act unless the owner or operator of the facility (before the end of such 4-month period) takes each of the following actions:

(1) Applies for the determination referred to in section 3005(e)(2)(A) of such Act.

(2) Certifies that such facility (A) is in compliance with all applicable groundwater monitoring requirements under subtitle C of such Act and (B) was in compliance with such requirements as of November 8, 1985.

(3) Certifies that such facility meets at least one of the criteria set forth in subsection (b) of this section.

The interim status of each such facility shall terminate on November 8, 1987, unless the owner or operator of the facility certifies (before such date) that such facility is in compliance with all applicable financial responsibility requirements under subtitle C of the Solid Waste Disposal Act. No facility shall be treated as operating in violation of the provisions of section 3005(e)(2) of the Solid Waste Disposal Act during the period between November 8, 1985 and the date 4 months after the enactment of this Act solely by reason of the failure

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of such facility to comply with such provisions before November 8, 1985.

(b) FACILITIES COVERED.—Subsection (a) shall apply to any facility used for land disposal of hazardous waste which has been operating pursuant to interim status under section 3005(e) of the Solid Waste Disposal Act if the facility satisfies at least one of the following criteria within the 4-month period specified in subsection (a):

(1) The owner or operator of the facility demonstrated before November 8, 1984, that the facility complied with all applicable financial responsibility requirements under subtitle C of the Solid Waste Disposal Act but insurance policies on which such compliance was based were cancelled after such date (or the owner or operator received, after such date, a notice from the issuer of any such policy of the issuer's intent not to renew the policy).

(2) The owner or operator of the facility had sales or revenues of less than $5,000,000 for all lines of business in the fiscal year preceding July 15, 1982.

(3) The facility is located in a State for which an authorized State program was in effect under section 3006 of the Solid Waste Disposal Act and, under such program, financial responsibility requirements pursuant

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to the Solid Waste Disposal Act did not become effective before Nov 8, 1984.

(4) The owner or operator of the facility has demonstrated to the Administrator that he has made a good faith effort to obtain the insurance necessary to satisfy all applicable financial responsibility requirements pursuant to the Solid Waste Disposal Act and provides documentation of that effort which is satisfactory to the Administrator.

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Mr. FLORIO. Congresswoman Smith.

STATEMENTS OF HON. VIRGINIA SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA; AND HON. NANCY L. JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mrs. SMITH. Thank you very much, Mr. Chairman.

I appreciate this opportunity to come before you to comment on the November 8 compliance deadline contained in the 1984 Hazardous and Solid Waste Amendments.

I commend you for holding this hearing to gain more complete information on the number of land disposal operations that have been or will be forced to close because of their inability to meet the requirements contained in that law.

I also appreciate the opportunity of hearing your very informed and concise review of the situation and the problems we face.

I would like to explain to you the difficulties faced by one of the four land disposal facilities in my district, T-L Irrigation of Hastings, NE, in attempting to meet the insurance requirements contained in the 1984 RCRA amendments and in attempting to cope with an inflexible program that does not allow the independent thinking required to manage land disposal operations from New Jersey to Connecticut to Nebraska.

Mr. Chairman, common sense will tell us that Congress should not dictate compliance with requirements that are impossible to meet. But at a time when few, if any, insurance companies are writing liability policies, as you alluded to, Congress has done just that by requiring land disposal operations to obtain liability insurance.

EPA has determined that a firm may, if it qualifies, elect to self-insure. But for small businesses, self-insurance is an impossibility.

What happens to these businesses, like T-L Irrigation, that cannot self-insure or obtain insurance from an outside source, and cannot, therefore, meet the requirements set forth in the law?

T-L Irrigation employs 75 people in the manufacture of center-pivot irrigation equipment. As a part of the manufacturing operation, which includes a galvanizing process, steel is dipped into an acid bath. This acid, of course, must eventually be disposed of. To do this, T-L has built storage lagoons on its property.

Therefore, T-L Irrigation was among those facilities that was required under the Hazardous and Solid Waste Amendments of 1984 to complete a permit application and meet ground water monitoring and financial responsibility requirements by November 8, 1985, to continue operation.

It has taken T-L's chief engineer 2 months, working full time, to complete the permit application, and the ground water monitoring wells are in place. To continue its operation after the November 8 deadline, T-L had only to meet the insurance requirements.

T-L does not qualify for self-insurance because it is a small business. The firm was thus forced to seek insurance from an outside insurance firm. After months of being turned down by insurance companies, T-L finally found—on November 7, 1 day before the compliance deadline—an insurance company that would consider

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writing a liability policy. The application procedure will take 4 to 6 months. When the procedure is complete, the insurance firm will decide whether or not to insure T-L.

In the meantime, T-L must either close its galvanizing operation or pay another company to transport and dispose of the waste. Both options have unfortunate consequences.

If the manufacturing process is shut down, T-L will probably be forced to lay off employees. Even 10 laid-off workers can have a devastating effect on a town the size of Hastings, especially in light of the struggling agricultural economy.

Shipping the waste would add 10 percent to T-L's manufacturing cost. To a small business operating in an industry as competitive as is the irrigation equipment industry in Nebraska, 10 percent can be the make-or-break margin.

To allow for a short-term resolution to this problem, Mr. Chairman, I urge your consideration of Mr. Broyhill and Mrs. Johnson's legislation that would offer a 1-year extension to meet the insurance requirements to those businesses that have made a good faith effort to obtain insurance and that can meet the other requirements.

Mr. Chairman, I believe it safe to say that the inability to meet the deadline can be attributed also to the slow-moving administration of the RCRA Program. I will again use T-L Irrigation as an example.

First, Mr. Chairman, I admit that what I am explaining is extremely confusing, but I am sure you will understand how those people in our district feel.

The waste generated by T-L was classified by EPA as "corrosive" 2 years ago. To neutralize the corrosivity, T-L added ammonia to the waste and constructed a $200,000 surface storage impoundment to EPA specifications.

Because similar storage units in Nebraska on or near the water table had caused underground contamination, and although T-L's impoundment is 100 feet above the ground water with 75 feet of natural clay barrier, T-L also installed an industrial grade liner to prevent any possibility of ground water contamination. The impoundment was designed to last 25 years.

But in July 1984, 1 year later, EPA "clarified" its interpretation of the rule governing the waste generated by T-L by stating that the waste was now "hazardous." This clarification made T-L's $200,000, 25-year storage impoundment obsolete and forced compliance with the November 8 deadline.

The Nebraska Department of Environmental Control tells me that T-L's waste is not hazardous, and it has encouraged T-L to submit a delisting petition. But as you know, Mr. Chairman, it takes several months for EPA to determine whether a delisting petition should be approved, and the petition most certainly would not have been approved by the November 8 deadline.

T-L was, therefore, forced to attempt to comply with the November 8 deadline, and there we are back at square one.

Mr. Chairman, the bottom line is that T-L has spent hundreds of thousands of dollars to comply with a hazardous waste program in which it should not be included.

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In closing, I will state that I strongly favor the right of each State to administer Federal programs in a way that best suits the needs of the individual State, and I support changes in EPA programs to attain this goal. I believe that this represents the best answer to the long-term problem.

For the short term, I will support Mr. Broyhill and Mrs. Johnson's legislation to offer a 1-year extension in certain instances for the insurance requirements contained in the 1984 RCRA amendments.

Thank you for this opportunity to express my views and those of my constituents.

Mr. FLORIO. Thank you very much. Mrs. Johnson.

STATEMENT OF HON. NANCY L. JOHNSON

Mrs. JOHNSON. Thank you and good morning, Mr. Chairman.

On behalf of those interested in responsible hazardous waste management, I appreciate your scheduling this hearing and giving this important issue your prompt attention.

As you well know, pursuant to the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and enacted into law on November 8, 1984, those hazardous waste generators who store such wastes on site must meet certain minimum technological and financial requirements. The requirements for such landfills and surface impoundments include sophisticated ground water monitoring, installation of liners, and evidence of financial responsibility.

As one who supported H.R. 2867, the bill that eventually became Public Law 98-616, I believe those requirements reasonable and achievable and necessary to protect the public interest.

In my district, I am pleased to report there was prompt action by those affected to comply with both the letter and the spirit of the law.

Recently it has become clear, however, that in today's world with its liability insurance crisis the financial responsibility provision is causing acute problems among generators who have worked hard to comply with their new responsibilities.

The EPA and various State offices of environmental protection and management have determined the financial responsibility requirements to necessitate one of two things: insurance for millions of dollars' worth of coverage or self-insurance. For the smaller companies that make up the backbone of American business and that provide literally thousands of jobs in the district that I represent, self-insurance for $1 to $6 million is simply out of the question. Thus, many of these companies have spent the last year or more, as my colleague from Nebraska described, searching for outside insurance policies that would provide the necessary coverage.

The November 8, 1985, deadline for meeting these financial responsibility requirements now has passed. Yet, many employers in my district alone have reported that, despite their best, good faith efforts, they have been unable to secure adequate insurance to meet the mandate of the law. They are in total compliance with every other aspect of Public Law 98-616 and in some cases have invested heavily—the same story that my colleague from Nebraska

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has told— to comply with the requirements proposed a few years ago by, for example by, building lagoons that now we are tearing out or replacing as we learn more and alter requirements. Some now face closure of their on-site landfills in the face of this new law because they cannot find affordable insurance coverage.

I have cosponsored Representative Broyhill's bill in the hope that your committee will examine this matter very closely and grant temporary relief from the financial responsibility requirements as an interim measure to make it possible for otherwise responsible companies who comply in every other respect and who employ many, many people doing responsible and useful tasks while we determine what other alternatives are available to us to deal with this situation.

With fewer and fewer fully permitted commercial waste sites available in the country, it is ludicrous in my mind for us to force well-intentioned companies who have good, environmentally conscious owners and managers into financial difficulties because of inflexible laws that do not recognize the reality of the insurance problem that we face in our society today which was nonexistent when the law was written and that is completely beyond the control of the individuals affected.

I want to run down the details of a case study briefly. One of the companies in my district—and this is a company whose president has been to Washington to testify in support of the responsibility of business to the environment, who has willingly taken on all those requirements that the laws have imposed and gone well beyond that—this is a small company that has a lab that meets the Connecticut Department of Health standards. I am sure you know what it costs to field that kind of an operation.

This is a company with 165 full-time employees, and $14 million in sales in 1985. It is a growing company serving an international market in automotive parts and home products. Annual expenses for all pollution control efforts, excluding capital investment, is $1.5 million or 12½ percent of gross sales.

They have now filed their RCRA part B permit. This is a three-volume application. It is 7 inches thick. It cost them $50,000 to do. They are planning to build an engineered landfill on site to manage their metal hydroxide sludge problem. Metal hydroxide sludge is a very stable waste, we know a lot about it and it can be managed in an environmentally sound manner when properly prepared for.

The company now has a quote, not a firm quote, of $26,000 for 1 million/1 million of sudden accident insurance per occurence/aggregate. This will be available after inspection of the company. It will cost them $4,000 to be inspected.

Another company has a quote of $150,000 per year. It would cost the company I am describing $2.5 million to close its facility and ship its materials elsewhere.

I do believe that it is our responsibility to address the situation that neither we anticipated nor our constituents anticipated. When we wrote the law, we believed it was possible to fulfill the requirements that we put therein. Under today's circumstances and the crisis facing the insurance industry and the catastrophe that is occurring in day care and for nurse midwives and in many other sec-

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tors of our economy, it is clear that the financial responsibility requirements are not achievable by many environmentally responsible companies and good employers in America.

It is my feeling that EPA's estimate of the number of affected companies is low. In Connecticut alone, there will be almost certainly 10 companies which, when thoroughly checked out, will meet all of the requirements, but not the financial responsibility requirement, and will be unable to have insurance and are not big enough to self-insure.

In Connecticut, United Technologies is fine. AVCO Lycoming is fine. Remington Arms if fine. The big guys are going to do OK. The little guys are going to go out of business. They can't afford to stay in, but the medium-sized companies, people who employ 165 people in small towns in my district, those companies that have made solid investments and have a history of compliance, of responsible action, of dedication, who are making a good-faith effort are in big trouble and I believe it is our responsibility to provide the kind of window to look at this situation that H.R. 3692 provides.

I would recommend that on line 19 where we talk about revenues of less than $5 million, I think that has to be raised to $20 million because now it is not only the tiny companies, they are going to go out. It is the medium-sized companies that are having the biggest problem in my estimation.

Mr. Chairman, I look forward to working with you in the next few weeks, first of all, to provide a legal window of opportunity for us to verify the extent of the problem, and to find alternative solutions. One solution that I think it is now imperative to investigate is the possibility of variable financial standards, varying as to the nature of the waste and the nature of the facility. A facility that deals only with metal hydroxide sludges, where there is no possibility of contamination from other chemicals and so on, is a facility that we know a lot about, how to build, how to manage, and we know it to be safe.

Those people, if they comply, should not be required to carry the dimensions of coverage that we are requiring of people who manage very toxic substances and I think that is the kind of consideration that we need to look into further in the next few months and in the interim provide a window of legality for responsible employers who have been performing well both environmentally and in their own manufacturing arena, to survive and to work with us as we search for a long-term solution to the financial responsibility requirement, which is, of course, extremely important to us as legislators and to our constituents.

Mr. FLORIO. Let me express the committee's appreciation for your testimony and Mrs. Smith's testimony.

One point has to be made very clearly that no new regulations were imposed in 1984. The provision in the RCRA bill stated in a somewhat redundant way that the law is the law and it has been the law since 1976 in a statutory way. It has been the law since 1980 in terms of compliance with regulations and we are serious that the law should be enforced so no one should have the impression that somehow some new regulation has been imposed in the last year.

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I think it is also important to note, and this is a symptom of part of our problem, the company that you are making reference to as well as the company that Mrs. Smith is making reference to, is not regarded by EPA as only having the financial security problem. They are not on the list of 35—if EPA feels there are other problems there or EPA hasn't got sufficient information to make the appropriate determination.

I think it is also important to realize that this whole problem could have been resolved if we had had expeditious consideration of the part B applications in the way that I know the Congress intended 10 years ago.

You have maintained that the company that you have been talking about has submitted a part B. That would supersede all of these interim regulations and that part B approval would supersede the need to comply with the interim regulations. You would have a licensed facility that by definition would be environmentally sound as opposed to a license under the interim system, which doesn't indicate environmental soundness, and it is almost an administrative set of regulations.

So there are really some difficult things that we have to deal with here. My only difficulty with the legislative proposal that has been offered is that it doesn't address what the real problem is, that is to say that if we have an exemption from the regulations of the law notwithstanding the fact they have been in effect for 5 years, 1 year from now, 2 years from now, we may be in the same situation because under the existing provisions people still may not be able to comply with them.

I would have hoped that with regard to financial responsibility, EPA would have expanded its regulations so as to allow environmentally safe but financially secure companies who can't get insurance to be able to comply with financial responsibility measures in different ways.

We are going to have EPA witnesses here. I will be asking them if they would be prepared to submit in legislative form alternative financial security measures that would constitute compliance with their thought on financial security. I will be happy to work very quickly to get something of that sort passed on a rapid basis if we can do that.

I am apprehensive about total exemptions because what we could be doing is just continuing inappropriate facilities, facilities that may not have ground water under the terms of Mr. Broyhill's legislation for a period of time, facilities that may not have financial responsibility for good reasons or for bad.

It may be that somebody can't get insurance because they shouldn't have insurance. The exemption would provide them with an opportunity to continue. You have addressed a number of basic problems, including the dispute as to whether something is hazardous or not.

We have placed that discretion in EPA to make those decisions. They have made those decisions and there are appeal processes that can be gone through but those appeal processes have been in existence for 10 years and someone saying now they don't want to comply with the modest regulations because they don't think they are a hazardous waste——

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Mrs. JOHNSON. My companies are not asking that they not be required to comply and they have been very responsible about compliance, and in the past the logic that they can't get insurance because they have problems or are leaking was a sound one but that is no longer the case. They can't get insurance because nobody will talk to them or look to see if they are leaking. We are in a crisis in the insurance industry in all areas.

Mr. FLORIO. When did their insurance expire?

Mrs. JOHNSON. They have not had insurance coverage for nonsudden occurrences because they have been unable to find an insurance carrier that would sell them a policy. Despite a 3-year search for the mandated coverage, their good-faith efforts have been unsuccessful; hence, the need for relief at this time.

Mr. FLORIO. A number of these companies saying they can't get insurance have never had insurance.

Mrs. JOHNSON. They have not been required to have insurance of the dimensions——

Mr. FLORIO. They have had that requirement on them for 5 years.

Mrs. JOHNSON. I have to check that out with them because Connecticut has a strong Department of Environmental Protection. If EPA doesn't know about them and their problems, it is because their application under part B has gone in only in the last few months. As they saw the problems and the necessity to deal with this on site, they have made an extensive application at great cost and great time. I don't know whether there is something different in terms of Connecticut's requirements.

I will check that out, but I do see a number of responsible employers, and there are in this instance jobs on the line. People are going to be unemployed and without jobs without good reason in 3 months. It is going to be hard for you and me to explain why Government can't respond to reality and I do appreciate your expression of willingness to work on this promptly and I certainly make myself available to do likewise and I know that you mean that when you say that.

I also understand the appeal process with regard to sludge and all of that kind of stuff, but for many reasons we have ignored the disparity between those items categorized as hazardous.

With this crisis upon us, I am suggesting to you that one possible alternative since the great mass of jobs is associated with metal hydroxide sludge and the plating companies that produce it, that is where a large number of jobs in this area are, I would suggest that we may want to right now in a short-term sense perhaps look at the problem from that point of view though I have not contacted EPA about this suggestion.

To tell you the truth, I only thought about it this morning, but it seems to me that it is a viable possibility and that we ought at least look at it.

Thank you for your time and consideration.

Mr. LENT. I want to take a minute to commend the gentlelady from Connecticut for her testimony. I think it can be said that when we passed this legislation back in 1984, we didn't see on the horizon the problem of obtaining insurance that now seems to be with us, and the gentlelady is correct because small companies did

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not have this insurance requirement, as I understand it, until January of this year, so that this is not something that has been going on for 4 or 5 or 6 years particularly with respect to these small companies.

I would like to commend the chairman for scheduling this hearing on this urgent issue. I would also like to commend the ranking minority member of the full committee, Mr. Broyhill, for his efforts in developing a legislative proposal, H.R. 3692 which I think would afford the committee and the Congress an opportunity to find an acceptable solution to the problem which is the subject of today's hearing.

I don't think there is anything in that proposed legislation which would permit companies that were not in compliance with applicable ground water monitoring regulations to continue. That bill has a very narrow focus. It would only cover, as I understand it, some 36 to 90 facilities that are in jeopardy of closing down. I know the gentlelady is a cosponsor of that bill.

Mr. Chairman, I would like to ask unanimous consent that my opening statement, which I will not deliver, be placed in the record at the appropriate place.

Mr. FLORIO. It will be done.

[The statement of Mr. Lent follows:]

STATEMENT OF HON. NORMAN F. LENT

Mr. Chairman, I commend you for scheduling this hearing on this urgent issue. I would also like to commend the Ranking Minority Member of the Full Committee, Mr. Broyhill, for his efforts in developing a legislative proposal (H.R. 3692) which would afford the Committee and the Congress an opportunity to find an acceptable solution to the problem which is the subject of today's hearing.

As a result of numerous newspaper and magazine articles, as well as the informative hearing you held in September, we are well aware of the availability and affordability problems in the liability insurance area. I understand that these problems are even worse when you are dealing with pollution insurance. It is no wonder that land disposal facilities cannot obtain the insurance required by the EPA regulations promulgated in 1982.

I am well aware of why we enacted the November 8 deadline. We wanted to force compliance with the longstanding groundwater monitoring regulations and financial responsibility requirements. At that time, however, I for one believed that the various land disposal facilities could meet the liability requirements if they simply put their minds to it. I believed it was just to close those companies who refused to comply with the law. I am concerned, however, that we are getting an unintended result. That is, companies are being forced to close their land disposal facilities even if they have done everything in their power to comply with the law.

EPA issued the financial responsibility regulations that are at the bottom of this problem. I would like to know what the EPA has done to correct this problem—and if they haven't done anything about their own regulations, why not. Is this an example of EPA not having adequate flexibility to manage a program in a changing environment?

I look forward to hearing from the witnesses that are here today and hope that we can find a fair solution for this problem.

Mr. FLORIO. My reading, and I think it is the clear reading of the bill, is that it does deal with ground water monitoring for a period of time. I think that is fairly clear. Just to clarify my statement before with regard to the phasing in of the regulations on insurance, the regulations were put in 5 years ago. They were phased in in layers and the company that you are talking about, if it is an $18 million company, would have been required to come into compliance by January 1983, I believe, so there was a phasing in.

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Mrs. JOHNSON. I will check that out and get back to the committee as to the difference in the requirements they met and the requirements they are required to meet, because that might be enlightening to all of us.

[The information requested was not supplied to the subcommittee.]

Mr. LENT. If I could be heard on that point. My reading of the Broyhill bill is that a company in order to come into coverage under the Broyhill bill must be in compliance with existing ground water monitoring provisions and requirements as of November 8, 1985.

Mrs. JOHNSON. That is my reading of lines 10, 11, and 12, as well.

Mr. LENT. I think the chairman may be incorrect, and perhaps we can resolve it later on when counsel has a chance to look it over, but my understanding of this bill and admittedly it is a cursory reading is that there is nothing in this bill which would exempt any company for other than failure to have the insurance. They must be in compliance with the ground water monitoring regulations as of November 8, 1985.

Mr. FLORIO. If the gentleman would yield, line 9, "The interim status of such facility shall terminate four months after enactment of this act unless the owner-operator of the facility takes the following action." So you are talking about continued exemption from all the requirements for a 4-month period and then the longer period that triggers the financial responsibility.

Mr. LENT. I think that says that you have 4 months to file the papers, but you must be able to demonstrate when you filed the papers that you were in compliance as of November 8, 1985.

Mr. FLORIO. We have Mr. Porter here and we can ask him.

Mr. LENT. We ought to do something about a monstrous problem with 36 to 90 facilities. Where are we going to put the stuff? We can't put it all in New Jersey?

Mrs. JOHNSON. I don't think the intent of the cosponsors was to exempt anybody from those requirements.

[The statements of Mr. Thomas and Mr. Broyhill follow:]

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Statement of the Honorable

WILLIAM M. THOMAS

Member of Congress, 20th District of California

Subcommittee on Commerce, Transportation and Tourism

November 13, 1985

Mr. Chairman, I appreciate this opportunity to comment on the insurance problems facing toxic waste disposal companies. Last Friday, companies operating under RCRA interim permits were required to either certify that they have insurance or begin closing down their operations. We have reached this result because our laws left EPA no choice in the matter. Now Congress must itself make some difficult choices: either provide retroactive relief to companies that have in good faith attempted to operate within the law or allow closure of a substantial part of our ability to handle hazardous materials.

The insurance issue is especially important because of its implications for our approach to hazardous wastes. While the United States is moving toward disposal techniques other than land disposal, land disposal facilities remain an important part of our current effort to safely handle hazardous wastes. Shutting down prudent operators merely because they cannot secure insurance means that our capacity to handle wastes will be reduced. The consumer will pay higher prices for a variety of products because of insurance matters, not necessarily because particular operators ran poor disposal programs. Even more threatening, in my view, is the risk that reduced land disposal capacity could encourage significant increases in "midnight

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dumping", the kind of activity Congress has long sought to prevent.

As the Subcommittee addresses the difficulties brought about by the insurance question, I hope two issues will receive special attention. First, permittees covered by state authorized enforcement programs should also receive relief when the Subcommittee acts. Second, relief granted should recognize that some operators have tried in good faith to obtain insurance without success.

Permittees covered by authorized state programs should be considered when relief is developed by the Subcommittee. Events last week demonstrate problems that may arise unless Congress addresses state programs. A trade group in Washington succeeded in obtaining a stay of action from the District of Columbia Circuit Court of Appeals. The stay was ended Friday, but it illustrates a potential problem. While the stay clearly affected federal insurance requirements, EPA interpreted the order as leaving state insurance requirements in place. EPA's interpretation of the order was that if state insurance requirements remained in effect, uninsured operators covered by authorized state programs would still lose their interim permits. We should not allow the same kind of situation to arise when we develop federal relief.

A second, equally important matter is the need to address relief for companies that have been trying in good faith to get insurance without success. Discussions I have had with people in the industry indicate that an insurance "capacity" problem may exist, one that prevents smaller operators from obtaining insurance without regard to the quality of their operation. Bigger companies can self-insure. To the degree we allow the insurance issue to eliminate some of the smaller companies, larger firms will benefit from reduced competition. If smaller firms' difficulty in obtaining insurance is recognized, we may be able to promote new approaches and better operations needed to handle our hazardous materials problems.

I recognize that the Subcommittee's task is a difficult one. The need to address the insurance problem is critical, however, and the issues I have mentioned deserve prompt, careful consideration.

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OPENING STATEMENT OF THE HONORABLE JAMES T. BROYHILL

Mr. Chairman, I want to commend you for calling this hearing this morning. The subject on which the Subcommittee will receive testimony today provides us with an opportunity to review an unintended ramification of the 1984 Solid Waste Disposal Act Amendments. As the Chairman knows, there is a sense of urgency surrounding today's hearings. Specifically, this relates to the inability of many companies to certify compliance with the financial responsibility requirements pursuant to the 1984 Amendments. Since last Friday, it appears, through no fault of their own, these companies have been obliged to close their land disposal facilities even though they have met the groundwater monitoring requirements under the law and despite their best efforts to obtain the necessary liability insurance. I have received numerous letters from companies outlining these problems, and I ask that these letters be inserted in the record following my statement.

Mr. Chairman, I believe the situation we are presented with does not comport with the results I believe we intended to achieve through enactment of the 1984 Amendments. By allowing this situation to persist, we are, I believe, penalizing those very businesses that have devoted time and money to comply with the groundwater regulations. I am particularly concerned with the potential adverse environmental impacts that forcing these businesses to close may have. If these businesses do not continue to generate funds, who will see that the remaining land disposal facilities are properly managed? Further, by

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forcing these businesses to seek other means of disposing of their hazardous waste, do we encourage midnight dumping?

Last week I joined several of our colleagues in introducing H.R. 3692 to address this urgent problem. Let me make clear to my colleagues that this legislation is only a temporary measure. If enacted, it would give Congress the time required to craft an acceptable legislative solution to address the underlying insurance problem in a more comprehensive manner or determine whether EPA can resolve this problem administratively.

Regrettably, we were unable to address this issue in the Subcommittee or Full Committee prior to the November 8 deadline. Nonetheless, I am pleased that we are beginning to review this matter today. I look forward to working with the Subcommittee Chairman to craft an appropriate legislative solution to the problem.

I also look forward to hearing the witnesses about a related problem -- the ongoing enforcement of the liability requirements. The legislation I introduced, and the primary focus of this hearing, is the loss of interim status on November 8. I am equally concerned about those businesses that are too small to meet the financial means test or to obtain the necessary insurance and are therefore technically in violation of the law. I hope that the witnesses will also address this problem.

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Mr. FLORIO. The committee stands in recess for approximately 10 minutes.

[Brief recess.]

Mr. FLORIO. The subcommittee will kindly come to order.

We are pleased to welcome the new Assistant Administrator for Solid Waste and Emergency Response, EPA, Mr. J. Winston Porter, and Mr. Gene Lucero.

Gentlemen, welcome, please proceed.

STATEMENT OF J. WINSTON PORTER, ASSISTANT ADMINISTRATOR FOR SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY GENE A. LUCERO, DIRECTOR, OFFICE OF WASTE PROGRAM ENFORCEMENT

Mr. PORTER. Thank you, Mr. Chairman.

This is my first appearance, as you mentioned, and I look forward to working with you.

I have a formal statement for the record, and I am going to present a summary version, if I might.

As the committee knows, virtually all aspects of the liability insurance market have been constrained in recent months. In particular, some facilities which dispose of hazardous wastes, either as a part of their own operations, or as a commercial treatment, storage, or disposal facility, have been affected by this tight insurance market.

The implications of the constrained market have been highlighted by the statutory requirements of the 1984 Hazardous and Solid Waste Amendments. By last Friday, all interim status land disposal facilities had to certify that they physically comply with all applicable financial responsibility requirements or lose interim status.

Once interim status is lost, these facilities must no longer dispose of hazardous waste. It is clear that, by enacting this provision, Congress intended for facilities not in compliance with RCRA's financial responsibility not to accept hazardous waste after November 8.

This morning, I would like to review briefly with you the liability requirements, the current state of the insurance market, and EPA's recent efforts to address the problem. Finally, I will discuss options that may be available to alleviate this situation.

First, with respect to liability requirements, on April 16, 1982, EPA promulgated regulations requiring third-party liability coverage for property damage and bodily injury resulting from hazardous waste facility operations.

The Agency required coverage for sudden and accidental events for all hazardous waste facilities in the amount of $1 million per occurrence and $2 million annual aggregate, exclusive of legal defense costs.

For landfills, surface impoundments, and land treatment facilities, the Agency also required coverage for nonsudden and accidental events in the amount of $3 million per occurrence and $6 million aggregate, again exclusive of legal costs.

There are two options for meeting these requirements. An owner or operator may obtain insurance or use a financial test based on

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net worth, to demonstrate that sufficient funds would be available to satisfy claims.

The Agency examined several instruments in search of maximum flexibility. Insurance was determined to be most suitable, in terms of the risk posed by hazardous waste management and the assurance to the public that funds would be available.

I might say, and I think this is very important, coverage requirements were then phased in over a 3-year period, based on the sales or revenue of a firm.

Status of the insurance market:

In order to develop solutions to the insurance shortage, we believe it is important to understand the general conditions which have led to the unavailability of RCRA insurance.

Liability coverage in many areas has been constrained in recent months. Commercial auto, medical malpractice, workers' compensation, and general liability have felt the effect.

In particular, and of interest to us today, are the effects on those facilities which must assure financial responsibility through commercial insurance.

Pollution liability insurance is considered to be high risk by insurers and availability of adequate coverage for high-risk lines, including pollution liability, is insufficient at this time.

Recent EPA actions:

As we have indicated, the hazardous and solid waste amendments were enacted in November 1984. The loss of interim status provision required that land disposal facilities certify compliance with ground water monitoring and financial responsibility requirements by November 8, 1985, in order to retain interim status.

This provision clearly reflected Congress' unequivocal concern that facilities comply with these requirements.

Late in 1984, EPA became aware, through industry publications, anecdotal information, and phone calls from regional personnel, that some facility owners and operators were experiencing difficulty obtaining commercial insurance.

On April 12, 1985, EPA issued enforcement guidance for liability insurance requirements. The guidance was for use only until November 8, 1985. It allowed those subject to the requirement to document their good-faith efforts to obtain insurance and thereby avoid enforcement actions for not meeting the applicable liability requirements.

Later on, we alerted the subcommittee of the likelihood that a significant number of facilities would lose interim status due to a lack of insurance.

In July, our regional offices notified facilities about the provision and explained our interpretation that compliance meant physical compliance with ground water monitoring and financial responsibility requirements.

On August 29, the Department of Justice confirmed to Chairman Florio the validity of EPA's interpretation of the term "in compliance."

On August 21, 1985, EPA published a notice of proposed rulemaking on liability insurance. The notice stated that EPA was considering taking action on a number of regulatory options, including suspension of the requirements.

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On September 25, 1985, EPA published a notice on implementation and enforcement policy for the loss of interim status provision. The notice stated that physical compliance with applicable liability requirements is required to certify compliance with this provision.

Thus far this fall, there have been several briefings for congressional staff on this LOIS provision and liability insurance. The result of EPA's survey of 268 land disposal facilities thought to be dependent upon the insurance market were reviewed. And we discussed potential solutions for the 30 to 90 facilities that will be affected by these insurance provisions.

On October 18, 1985, Lee Thomas sent letters to Senator Stafford and Congressman Dingell, outlining the liability insurance problem as it relates to the loss of interim status provision and providing information resulting from the survey.

The Agency conducted a series of briefings for affected outside groups to detail our concerns and verify that EPA intended to enforce the requirements.

This morning, we would like to direct our remarks as much as possible to look ahead. Editorially, I might say that this problem has come up on us relatively quickly, a 1985 phenomenon, and we would like to look ahead in terms of what ought to be done.

The Agency had considered a suspension of the liability regulations as a temporary solution to the problem of a constrained insurance market.

However, the approach has serious disadvantages. Until the liability coverage requirements are reactivated, adequate protection may not be provided to human health and the environment. Those firms that currently have insurance may terminate their coverage as a result of the suspension.

In addition, suspending the requirements—this is very important—would also suspend much of the demand for such insurance, reducing incentives for carriers to provide insurance policies for RCRA facilities.

As I have already mentioned, comments received as a result of the August 21 notice on liability insurance indicate widespread support for continuation of the liability provision.

The Agency is pursuing additional mechanisms which could meet the financial assurance requirements in the future. Even so, the question of what can be done about those facilities that lost interim status last Friday solely because they could not get the necessary liability insurance is one that can be answered only by the Congress.

EPA has no administrative mechanism available to it to restore interim status once it has been lost. The approach Congress, we think, should consider for restoring interim status could be directed toward the following types of facilities:

A, firms which recently lost insurance; B, firms which had insurance requirements applied in January 1985.

Mr. FLORIO. Do you have a breakout of that category?

Mr. LUCERO. Not a precise one.

Mr. FLORIO. If you don't have it, how are we supposed to do it?

Mr. PORTER. I think we can get a handle on that. I don't have the number right in front of me. The other group, that might be ex-

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empted is facilities, who have had insurance requirements applied recently; that is, as of January 1985.

We feel that those facilities for which insurance was required in January 1983 or 1984 had ample notice, also the market was not particularly constrained at that point. So we think that is a group that should be considered, if you do consider legislation.

Mr. FLORIO. Do you have a breakout of that group?

Mr. PORTER. We have a sense of it, sure, we can get it.

I hope this statement will be helpful to the committee in determining what actions can be taken to address the problem of the constrained liability insurance market. I and my staff are prepared to work with the committee and its chairman in developing an effective and equitable solution.

[Testimony resumes on p. 41.]

[The prepared statement of Mr. Porter follows:]

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STATEMENT OF
J. WINSTON PORTER
ASSISTANT ADMINISTRATOR
FOR SOLID WASTE AND EMERGENCY RESPONSE
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON COMMERCE, TRANSPORTATION AND TOURISM
OF THE
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

NOVEMBER 13, 1985

Good morning. I am Dr. J. Winston Porter. I am the Assistant Administrator of the Office of Solid Waste and Emergency Response at the U.S. Environmental Protection Agency. With me today is Mr. Gene Lucero, Director of the Office of Waste Programs Enforcement.

I welcome this opportunity to speak to the Subcommittee today on the issue of hazardous waste liability insurance and to review EPA's actions in this area during the past year.

As you know, virtually all aspects of the liability insurance market have been constrained in recent months. In particular, some facilities that dispose of hazardous waste, either as a part of their own operations or as a commercial treatment, storage, or disposal facility, have been affected by the tight insurance market. The implications of the constrained market have been highlighted by the statutory requirements, imposed by the 1984 Hazardous and Solid Waste Amendments (HSWA).

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By last Friday, all interim status land disposal facilities had to certify that they physically comply with all applicable groundwater monitoring and financial responsibility requirements or they lose interim status. Once they lose interim status, they may no longer continue to dispose of hazardous waste into land disposal units at the facility.

It is clear that, by enacting this provision, Congress intended that facilities not in compliance with RCRA's groundwater monitoring and financial responsibility requirements not be allowed to continue to accept hazardous waste.

I would like to review with you a brief history of the development of the liability requirements, the rationale behind the requirements, the current state of the insurance market, and EPA's efforts to address the problem over the last year. Finally, I will address options that may be available to correct the situation.

Regulatory Requirements

The current Federal liability insurance requirements addressing the need for both sudden and nonsudden occurrences were published on April 16, 1982. A nonsudden or gradual accidental occurrence is an occurrence which takes place over time and involves continuous or repeated exposure. A sudden accidental occurrence is an occurrence which is not continuous or does not

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involve repeated exposure. In both instances, the coverage is to compensate injured third parties who sustain bodily injury or property damage as a result of accidents arising from the operation of a hazardous waste management facility. To assure proper coverage under Federal regulations, an owner or operator may either obtain an insurance policy or use a financial test based in part on the firm's net worth. However, facilities owned or operated by a Federal or State entity are not required to comply with these regulations.

All treatment, storage and disposal facilities were to have coverage for sudden occurrences in the amount of $1 million per occurrence and $2 million annual aggregate, by July 15, 1982. The provisions for nonsudden occurrences, which apply only to landfills, surface impoundments and land treatment facilities, require coverage in the amount of $3 million per occurrence and $6 million annual aggregate. The requirement is on a per firm, not per facility basis, and must cover both interim status facilities and facilities with a permit.

To provide time for the insurance industry to respond adequately to the nonsudden requirement, owners and operators were provided with a three-year phased-in schedule for demonstrating that coverage. The phase-in was based on the sales or revenues

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from all lines of business in the fiscal year preceding the effective date of the regulations. For owners or operators with sales or revenues totalling $10 million or more, the effective date was January 15, 1983; for those with sales or revenues between $5 and $10 million, January 15, 1984; and for those with sales or revenues less than $5 million, January 15, 1985.

Considerations in Regulatory Development

On April 16, 1982, the Agency promulgated the present requirements. Throughout the development of the liability regulations, the Agency met extensively with various representatives of the insurance industry to establish requirements which both the insurance industry and the regulated community could meet, and which would be protective of human health and the environment.

In developing the financial responsibility regulations, EPA has responded to changing circumstances by incorporating flexibility into the provisions, while still adequately protecting the public. For example, the Agency allowed a phase-in of the nonsudden coverage requirement. This was done to respond to insurer comments indicating that such insurance was available, and large waste management firms had nonsudden coverage already.

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Even so, it would take the insurance industry some time to respond to market demands from the smaller firms. Also, the amounts of coverage were reduced to the present amounts. Finally, the Agency added the use of a financial test as a method of demonstrating coverage, and allowed for the use of a variance from the amounts of required coverage.

The Agency believes that insurance is the preferred method of providing funds to injured third parties. While insuring against risk from hazardous waste management is a relatively new area, it is one which is suitable to the insurance mechanism. This is true both in terms of the risk posed and the assurance to the public that funds would be available. In addition, this is a less intrusive method than a government fund, for example, because it relies on the private sector.

The Agency did examine other instruments in a search for maximum flexibility. First, EPA examined but rejected the use of surety bonds. Bonding is not perceived by surety companies as a form of insurance. Rather, it is an evaluation by the surety company that the assured will be able to perform a stipulated activity. When an assured entity defaults on its obligation, a surety company expects to recover whatever it pays out under the bond from the assured. Consequently, a bond may not be made

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available to the majority of the small- and medium-sized hazardous waste firms without almost 100 percent cash or equivalent financial resources as collateral to secure the bond. Many of those firms would neither desire nor be able to keep adequate liquid assets for the entire duration that the bond would need to be held. Additionally, a bonding company, unlike an insurance company, is not equipped to review and pay meritorious claims. In addition, surety officials indicated that they were not interested in expanding their involvement.

The Agency also considered a national fund. This approach would require legislation. If such a fund were set up, EPA or some other federal organization would have to review claims and pay out funds to injured third parties. This is not a task the Agency is equipped to perform. The insurance industry, however, appeared to be willing and able to provide effective coverage. Consequently, the Agency felt that a national fund for the purpose of covering damages from sudden accidents would not be appropriate.

Finally, in the Hazardous and Solid Waste Amendments of 1984, the Congress itself listed instruments to be used to demonstrate financial responsibility. The statutory list included existing mechanisms authorized by the Agency for liability. No additional mechanisms were mentioned in this legislation.

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Current Insurance Market

In order to develop solutions to the insurance shortage, EPA believes that it is important to fully understand the conditions which have led to the unavailability of RCRA insurance. To date, our research indicates that there are several important reasons for the current reduction in availability of RCRA insurance. I will discuss these reasons in detail.

The major reason for the current insurance capacity shortage is the insurance underwriting cycle. To elaborate, traditionally, the insurance industry derives its profits from the investment of insurance policy premium income. During periods (e.g., late 1970's - early 1980's) when profit from investment income increased (due to high interest rates), a highly competitive insurance industry accepted premiums that did not adequately reflect risks, under the presumption that investment income would offset policy losses and still leave a substantial profit.

As interest rates declined (in the mid 80's), investment income also declined leaving insurers with insufficient income to offset insurance policy risks. As a result, the insurance industry incurred broad underwriting losses (e.g., $3.55 billion in 1984) in virtually all lines of liability coverage (e.g., commercial auto, medical malpractice, workers compensation, general liability).

During periods when insurers are incurring broad losses, capacity (i.e., investment in the insurance industry) decreases in all lines, but especially in those deemed high risk (e.g.,

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medical malpractice, product, pollution, midwife, daycare liability). As a result, availability of these perceived high risk lines, including pollution liability, is insufficient.

Pollution liability insurance is considered to be high risk by insurers because of:

- a perceived lack of actuarial data and universally applied risk analysis methods to establish premiums that adequately reflect risk;
- real and anticipated losses attributed to hazardous waste related legal claims for damages against ambiguous insurer contracts, due to courts following the judicial precedent of interpreting ambiguities in insurance contracts against the drafter (i.e., the insurer);
- a social perception that hazardous waste has not been and cannot be adequately managed; and
- resultant expanding tort liability for virtually all policies, a subsequent duty to defend those policies, and high legal costs and policy losses due to court rulings in favor of the insured for coverage that the insurer did not intend to provide.

Recent EPA Actions

In November, 1984, with the enactment of the Hazardous and Solid Waste Amendments, land disposal facilities were required to certify compliance with applicable ground-water monitoring and financial responsibility requirements by November 8, 1985 in order to retain interim status. There requirements were set forth in the Loss of Interim Status provision. This reflected Congress' unequivocal concern that facilities comply with these requirements.

During the winter of 1985, EPA was alerted -- through industry publications, anecdotal information, and phone calls from regional

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personnel -- to the fact that some facility owners and operators were experiencing difficulty in obtaining liability insurance. On April 12, 1985, based on this information, EPA issued enforcement guidance for liability insurance requirements. The guidance was for use only until November 8, 1985. It allowed those subject to the requirement to document their good faith efforts to obtain insurance and thereby avoid enforcement actions for not meeting the applicable liability requirements.

Meanwhile, the Agency undertook the task of implementing the Loss of Interim Status provision. We considered whether compliance could mean compliance with an order or whether it meant physical compliance. In a letter of June 24, 1985 to Mr. Florio, Chairman of the Subcommittee on Commerce, Transportation and Tourism, we advised that the concept of compliance could not be expanded under the statute to provide an extension or exception to facilities that had made a good faith effort to comply. We also advised the Subcommittee of the likelihood that a significant number of facilities would lose interim status due to the constrained insurance market.

In July, our Regional offices notified facilities about the provision and our interpretation that compliance meant physical compliance with ground-water monitoring and financial responsibility requirements. On August 29, the Department of Justice confirmed to Chairman Florio the validity of EPA's interpretation of the term "in compliance". The Department noted that Congress severely restricted the Agency's discretion to exempt facilities that have not attained physical compliance. We published our

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interpretation of the Loss of Interim Status provision in the Federal Register on September 25, 1985. We again advised facilities of this provision in or about late October in a second mailing.

After the ground-water hearings in the spring of 1985 held by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, we considered the impacts of the provision. We developed a list of facilities subject to the Loss of Interim Status provision. Then we estimated who would not be able to qualify for the financial test. EPA staff developed a questionnaire to be distributed to personnel in Regions and authorized States so that they could tell us the status of compliance with liability insurance requirements by the 268 facilities included in the survey. Because some of the information from authorized States was difficult to obtain, the results from the survey were not final until early September. Senate and House staff were briefed on the results of the survey. House staff was first briefed on September 19 and both House and Senate staff were briefed on October 15. The survey indicated that 50 to 100 facilities might not be able to certify on November 8 solely because they could not obtain the necessary liability insurance.

On August 21, EPA also published a notice of proposed rulemaking on liability insurance to solicit public comments on alternatives available to address the liability insurance problem.

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Based on comments received and the fact that we could not change State requirements, on October 15, we also alerted the staff that EPA did not have any appropriate regulatory options available to it in the short-term to alleviate the problem facing these 50 to 100 facilities. Any relief would have to come from Congress.

Potential Solutions

The Agency considered suspending or cancelling the liability insurance regulations in their entirety as a temporary solution. This approach has certain benefits. It would avoid the possibility of enforcing requirements which currently may not be attainable. Owners and operators of RCRA facilities would not face potential citizen suits for noncompliance with regulations. Also, a suspension would give the Agency, the regulated community, and the insurance industry more time to develop appropriate methods of financial responsibility for liability coverage at RCRA facilities.

However, the approach has serious disadvantages. Until the liability coverage requirements are reactivated, adequate protection may not be provided to human health and the environment. Insured firms would be able to terminate their coverage as a result of the suspension. In addition, suspending the requirements would also suspend much of the demand for such insurance, reducing incentives for carriers to provide insurance policies for RCRA facilities. Another problem with suspension is that a mechanism would be needed to determine when the market has recovered sufficiently to reinstate the liability coverage requirements.

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Most importantly, under a suspension the States would not be precluded from enforcing any state liability insurance regulations.

EPA included a suspension of the regulations as a proposed option in the August 21, 1985, proposal. In general, comments received from the states and the public opposed suspension of the liability insurance regulations.

EPA does not believe that the liability insurance requirements should be suspended. Over the next several months, the Agency does intend to pursue suggestions to allow a corporate guarantee to satisfy the liability requirements. In addition, the Agency will consider letters of credit and indemnity agreements as other possible mechanisms.

The question of what can be done about those facilities that lost interim status on November 8 solely because they could not get the necessary liability insurance is one that can be answered only by the Congress. EPA has no administrative mechanism available to it to restore interim status once it has been lost.

Conclusion

I hope this statement will be helpful to the Committee in determining what actions are appropriate to address the problem of the constrained liability insurance market. I am prepared to work with the Committee and its Chairman in developing an effective and equitable solution.

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Mr. FLORIO. In the legislation, is there or is there not a 4-month exemption enacted into law, 4 months from the point of enactment, so if it takes another 2 months to enact the law, and 4 months after enactment, we are talking about a 6-month exemption from the ground water monitoring.

Is my interpretation correct or incorrect?

Mr. PORTER. It is not clear to me as I read this. One reading could be that you are certifying compliance as of November 9. My statement would be that we are not for that in any event.

What we would like to see happen, if anything happens, is that the insurance issue be addressed, but we are not sympathetic about the ground water monitoring situation, so I would hope that as——

Mr. BROYHILL. Would the gentleman yield?

The intent was to take care of those situations where the facility was attempting to get this all wrapped up. They would have to—the intent of this, as I believe was testified to earlier, that the certification is that they were in compliance on November 8?

Mr. PORTER. If that is the proper reading, that is fine.

Mr. BROYHILL. All we were talking about was the paperwork requirement because of the delay in getting the insurance, and that is happening and in your agency, sir.

Mr. PORTER. I am not sure how that applies to the ground water monitoring.

Mr. BROYHILL. If they have the wells in place, and they were doing that on November 8, they are in compliance with that part of the regulation.

Mr. PORTER. We would certainly like to work with the drafters of the legislation to clarify that. The point I was trying to make is that we think the relief, to the extent there is relief, should be directed toward that rather relatively narrow group who for only one reason, lack of insurance, are having trouble certifying, but not the group which is having trouble meeting the requirements of ground water monitoring.

Mr. BROYHILL. That is not what we were talking about there, and it was in consultation with your people that we wrote this.

Mr. PORTER. OK, I would be happy to work with you to clarify that. If the intent is to say it is a paperwork thing, to say we want to be sure those people were in compliance with ground water monitoring November 8?

Mr. BROYHILL. That is the intent.

Mr. FLORIO. Thank you for that clarification.

What the gentleman is saying is that he does not intend to use delay in the paperwork approvals for ground water monitoring certification as an excuse not to have on November 8 certified ground water monitoring wells.

Mr. PORTER. I know the legislation has changed some perhaps since I have seen it. People had to certify on November 8 that they had the requisite ground water monitoring systems.

Mr. BROYHILL. Also that they had the financial responsibility.

Mr. PORTER. That is right, and I am sympathetic to that.

Mr. BROYHILL. There has been confusion out there, and when they could not certify to one, there was a delay in the paperwork with respect to getting the paperwork in on both.

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Mr. PORTER. The thing that I have heard, and maybe we are saying the same thing a different way, there are some people out there who perhaps, because of the insurance problem, got discouraged and did not file their part B or their ground water monitoring certification.

We could work on that situation, if in fact they had the ground water monitoring system in, and they had the part B together.

But, if they got discouraged because the insurance thing is so Draconian and said, "we can't meet that, we are not going to do anything," EPA would like to talk about that situation.

Mr. BROYHILL. That is what we are talking about there, and there are a number of them out there, and I know about them.

Mr. FLORIO. Let me conclude my questioning with a couple of specific points.

Just to frame the magnitude of the problem that we are talking about, there are over 1,500 interim facilities out there. The information we have from you is that there are 35 that you have identified that have exclusively a problem with regard to financial security.

It seems to me that that is the targeted universe that you are talking about. I am a little confused because it has been represented to me that the legislation that has been offered has been offered with your support or in conjunction with your agency. I got the clear impression from your statement that you are not supportive of suspending the existing regulations, and the rulemaking process. It indicates that the commentators don't support that, rather, you are talking about targeting the universe of people directly affected because of financial security, and you further refine that universe as people who are effectively the small, small group of the 35 who are supposed to come into compliance only relatively recently and those who have had insurance in the past and have had it canceled, which I suspect it even a smaller universe of the 35.

You have stated to me that you have not got documentation as to what the universe is. We have done our survey in the last week and a half that of the 35, the 27 facilities of the 35 we contacted, that 6 now meet the financial test, 3 have obtained insurance of the 35, and 11 found alternative means of disposing of their waste and therefore have no interest in going forward.

We are now down to about five sites and we don't even know whether they are five sites that are recent; that is, small companies that are required to come into compliance with these regulations, and whether these people ever had insurance in the first place and we don't know whether these people are capable of getting insurance.

If we are leaking all over the place and constitute a hazard, we want them to close up. Is this a real crisis or what is your thought on this?

Mr. PORTER. First off, we are looking at a moving target. When we did our survey, a month or two ago, the numbers were a range, in the order of 30 to 90.

We do not know up to, say, November 7, how many people may have at the last minute tried to put in wells. Our analysis was based on splitting the universe two ways. We took the 1,575 facilities in interim status, and, talking to our regions, we tried to get a

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sense of how many people didn't need insurance. That is a large group.

Of those left, how many do not appear to be in conformance with ground water monitoring, because their nonconformance with that means they couldn't certify anyway.

I am not going to defend to the death those numbers, because it is a moving target. By crafting something which talks about people who recently had to get insurance, January 1985 to pick up all the small firms; and which covers those people who may have had insurance at one time, which shows they are insurable, but lost the insurance, that will tend to get all those people and perhaps a few more.

It is hard in applying those two tests to think of too many people who are otherwise impeccable that would not be in that universe.

Mr. FLORIO. Your testimony is that you do not support a waiver, an exemption as is contemplated under the legislation, but rather you would support, I assume, a targeted statutory effort to expand the definition of financial security, so as to be able to provide alternative options to those who either do not have the assets test, the assets test capability, or cannot obtain nonsudden insurance?

Mr. PORTER. Yes. I think there are two points here.

As we look ahead, remember, this financial responsibility requirement is not going to go away, people still have to get a permit and we will be looking at financial instruments as they apply for a permit.

As I read the proposed legislation, I don't think we are that far apart. We would like to see it, to be sure that we have it crafted to take care of those people who in fact have the ground water monitoring, have a part B, but as I have said, have either lost insurance or have recently had to get insurance.

The group that came under regulation in January 1985, was almost coincident with the start of the insurance crisis.

Mr. FLORIO. When you say you are not that far apart, how do you justify that? The legislation provides for a substantial period of total waiver of these financial security requirements, notwithstanding the nature of the company, notwithstanding whether there was insurance or not, and that seems to be the focus of your suggestions?

Mr. PORTER. By using our test and we have to look at this more carefully, we will get in the universe about the same group. We are talking about keeping people in the permitting universe, saying you will not lose status as of November 8, but you will still have to get a permit some day.

We can't draft this totally by committee here, but I would be happy to sit down with the gentleman and try to figure out how we could draft it. Those tests we apply will bring all the aggrieved parties, otherwise impeccable people, into the system.

Mr. FLORIO. Are you prepared to submit to us a legislative proposal to target the group that you are talking about?

Mr. PORTER. We would be happy to work with you on that, sure. I am not sure of the mechanism in terms of how we ought to do it.

Mr. FLORIO. If you are not sure how to do it, we don't have the information as to what the universe is, the information with regard

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to what it is we are talking about. We would really like your suggestions and legislative proposals.

Let me yield to the gentleman from New York.

Mr. LENT. May I yield?

Mr. FLORIO. To the gentleman from North Carolina.

Mr. BROYHILL. I am concerned that we are dealing with this problem after the November 8 deadline, and I would like to ask this question.

Was there any effort on the part of the agency, or could the agency have taken any action before the deadline in order to permit these companies to meet their liability requirements.

In other words, could you have done something to permit them to continue their interim status, and to continue their efforts to meet the liability standards?

Mr. PORTER. Congressman, one of the real problems we have had on that is that whatever we try to do at the Federal level does not fix the problem, the financial responsibility problem, at the State level.

Many States have authorized this program, they have their own insurance requirements, so I could unilaterally do something to correct the problem in some 30 or 40 States which have that sort of program.

Mr. FLORIO. Would the gentleman yield on that point?

I am not sure I understand that that is the answer. You are not saying that these people are somehow not in compliance with the stiffer insurance regulations that some States may have superimposed upon the Federal requirements, are you?

Mr. PORTER. They are running the program, in their States.

Mr. FLORIO. In accordance with the standards that you spell out? To say that the State involvement is muddying up the waters is not addressing the problem we are talking about, which is the failure to comply with the Federal requirements that you are in charge of administering.

Mr. LUCERO. Congressman Florio, this is a difficult area and to respond to Congressman Broyhill's question, I would like to go back in time and put in perspective what we did try to do to anticipate this problem.

Early last spring, we did identify this as a potential impact, the loss of interim status provision was going to create this kind of disruption and we raised this over a period of time with staff.

The first thing we explored with the Department of Justice, our own Office of General Counsel, and with staff members was the idea that we could put a number of these companies on compliance orders and defined that as compliance which would meet the terms of the statute.

There was a lot of adverse reaction to that, especially from staff members here on the Hill.

Mr. BROYHILL. There were many of us that were urging that that be done, and we then have time to sort this out, because there is a crisis in the liability insurance market out there.

Mr. LUCERO. We were advised and through a series of letters back and forth, with the Department of Justice, it is clear that the legal reading of that statute by the Department of Justice that there is not that flexibility in the statute, that we could not use

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compliance orders and define those as being in compliance with the applicable requirements.

Mr. BROYHILL. That means that you are penalizing those very businesses that have attempted to do what your colleague here has said, and that is, they have spent a lot of money to attempt to comply with the regulations, the ground water regulations, and then now we find that they are not in business, or they could be forced out of business and not going to have the wherewithal to continue to protect the ground water in future months, future years.

Mr. LUCERO. When we found that we couldn't go that way, we went forward with a Federal Register notice and solicited comments and possibly suspending the regulation.

As Dr. Porter has indicated, it became evident to us that that was not a solution that would work in this particular case, so the position we came to, beginning in late September and through October, we began to advise staff and others, we didn't think there was an administrative remedy available to us and for that reason, we suggested to staff that a legislative solution needed to be considered and that we were encouraging people to think about the possibility of an extension of time in which to certify compliance with the liability requirements.

We still think the liability requirements are very important, but the current market creates a problem.

Mr. BROYHILL. It was in that spirit which I have introduced this legislation, in an attempt to try to let us have time to try and sort this out and at the same time, to assure that your regulations with respect to ground water monitoring is going to be continued.

I have a letter in my hand coming from the Regional Administrator, region IV, and it says, a number of facilities are in jeopardy of losing interim status under RCRA, because they are unable to obtain the necessary insurance to comply with financial responsibility requirements.

He goes on to say, he does not know the number, exactly, of how many facilities would lose the interim status solely due to the financial responsibility requirements, and he goes on to say that they are going to comply with the law, but the Regional Administrator, region IV, indicates there are 34 facilities in North Carolina that are subject to the requirement and only one, as of this writing, had submitted acceptable certification to EPA.

That indicates to me that we need to take a look at this. Thirty-four in North Carolina, and yet, when we had hearings just a few short months ago before this committee, the indication was that there was no problem with respect to these facilities, with respect to their compliance with the ground water monitoring requirements.

I suspect we will find a number of these are due to the liability problem, and I have already heard from a number of them in that respect. I do believe that we do need to enact some interim legislation here.

We are not providing for any broad waivers, or as the chairman has tried to indicate, and I disagree with him very strongly, all we are trying to do is to say a person who made a good-faith effort to get their liability, attempting to get their liability and otherwise

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are in compliance with the regulation, that we are going to let them continue receiving waste and continue to operate as they have in the past.

It does no one, in my judgment, does any of us any good to just close them down. They no longer are able to generate the necessary funds to be able, or to remain a land disposal facility or to continue monitoring for that matter.

Mr. PORTER. We are certainly concerned about those people that have ground water monitoring, filed part B, and meet the criteria in terms of the ones we discussed, that have not been able to get insurance.

It is a moving target——

Mr. BROYHILL. What is wrong with my bill, then?

Mr. PORTER. I don't think there is anything wrong with your bill.

Mr. BROYHILL. It sounded like you were blasting my bill, and I want to know where you stand on this, because it was your agency, sir, that helped us develop this bill, and now you are coming up here.

I want to know where you stand on it.

Mr. PORTER. I think we should give an extension for those people who are not able to get liability insurance, but have done the other things that they were asked to do, and my understanding is that can be accommodated in your bill, and I would be happy to work with you on it.

Mr. FLORIO. The gentleman from New York is recognized.

Mr. LENT. Thank you very much, Mr. Chairman.

I would like to follow up on the line of questioning of Mr. Broyhill. You indicate in your statement that there are somewhere between—you say here on page 11, on October 15, we also alerted the staff that EPA did not have any appropriate regulatory options available to it in the short term, to alleviate the problem facing these 50 to 100 facilities.

Any relief would have to come from Congress, so there are somewhere between, I have heard the figure 38, now I hear 50 to 100, somewhere between 38 and 100 facilities that might be affected by this, and you on October 15, EPA announced it would, or it could not further suspend the FR requirements, and you again called for a legislative—or suggested a statutory solution that would provide a 1-year suspension of the FR certification requirements to those facilities that met certain criteria.

Now, as I read this legislation, we have given you a little more in the bill, 2 years, and you may want us to roll that back from 2 years to 1 year, but other than that, is there anything in this bill which, as the chairman, the ranking minority member has indicated, was introduced at your behest, that you find fault with.

I get the impression that you are here testifying against this bill which we put in to help you get over a problem that is there.

Mr. PORTER. I am going to let Mr. Lucero comment on this.

Conceptually, we are saying the same thing. I am having a hard time arguing about the details of each thing. The one minor disagreement if, in fact, there is one, I may have misread this, I don't particularly want to talk about ground water monitoring, but I want to talk about insurance.

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To the extent the bill gives relief on insurance, I am very sympathetic.

Mr. LENT. The bill says anybody that has met the ground water monitoring requirements and the other criteria that are already in the law and met everything except for the financial responsibility requirements, would be the only companies that would be covered under the terms of this legislation.

You said earlier, we should look forward and I am sure the chairman wants to look forward if we have a problem, why don't you people take a copy of this bill, and sit down with your lawyers and make some modifications in it so it covers all the basis that you want covered and doesn't go any further than you want.

Perhaps we are trying to give you more discretion in this bill than you really want. Maybe you are nervous, if you have too much discretion, Mr. Florio might have you down on the carpet somewhere down the road.

You have got a problem, take this bill, fix it up, however you want, and get it back to us and let's move forward.

Mr. FLORIO. My only concern is about discretion, we have seen a little bit here this morning.

Sir, you are either for the exemption, the suspension of the regulations, even say specifically with regard to financial security, or you are not. Now, we have on the record both positions here today, that I don't mind having some proposals from you to target in, not to have a wholesale exemption, but to target in.

That is not the concept of the bill. If you can provide us with—I would be more than happy to get suggestions from you, to talk about those people, total compliance with everything else, who have not been able to get insurance who are at facilities that are not leaking, that have tried to get insurance, who have had insurance in the past, particularly those who are bigger companies, for a period of time, and those who are now able to come in full compliance.

That was what I thought you said earlier, that you were not, and you quoted, and we have Mr. Thomas on record in a letter saying that there is no support for an exemption, a suspension, that the comments that came in during the regulatory hearings overwhelmingly said that there was no need for a suspension of these regulations.

Now, you are telling us, and I am not being critical, that there is a need for legislation to deal with a smaller target of people rather than just to suspend for a 2-year period the financial security requirements, I am more than happy to get from you some direction in that manner.

Mr. PORTER. OK.

Mr. LUCERO. If I could respond, we could help to clarify just a little bit, because the terms are being used interchangeably here.

Congressman Broyhill's bill deals with an extension, not a suspension, as I have looked at it, of the requirements. The agency is not in favor of suspending the liability requirements for a number of important reasons.

Congressman Broyhill's bill does two additional things beyond what Dr. Porter has said we encouraged. One is that in addition to meeting certain criteria which we have supported in the most

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recent version of the bill I have seen, it adds one additional criterion. This is "good faith," the facilities have been attempting in good faith to comply.

That is clearly within Congress' discretion to give us another criterion, whether someone should get this additional extension. The only other area where something additional was done, was to give a 4-month grace period for giving this certification on the aspect other than ground water monitoring.

It was a 4-month grace period, and it appeared to deal with that group of companies who may not have filed their certification, because they were confused or stymied by the lack of insurance.

Those are the two areas.

In response to a specific request from staff for Congressman Broyhill, we have given a limited proposal. The question of the grace period, and the good-faith additional criterion, we were not prepared to comment on favorably or oppose.

Mr. FLORIO. Is that 4-month grace period, does that also apply to the requirement for the application for the part B approval?

Mr. LUCERO. Yes.

Mr. FLORIO. In addition to the ground water grace period waiver 4-month period, it also constitutes authority to in a sense forget about the failure to apply for the part B requirement, November 8?

Mr. BROYHILL. Would the gentleman yield?

That is not what it says. It has that many months in order to get the paperwork through, but they have to show that they were in compliance before November 8, 1985. That is what the bill says.

Mr. FLORIO. I ask for the expertise here, on November 8 here——

Mr. BROYHILL. You can put whatever interpretation you want on it, but I am reading the bill.

Mr. FLORIO. If I could frame the question, on November 8, you either apply for part B approval or you don't, and with this bill, as I understand it, and I would be happy to get different interpretations, on November 8 and for a 4-month period after enactment of this law, the failure to apply is waived?

Mr. LUCERO. The point, Congressman Broyhill, is that the language could be improved a little to deal with your concept, and I think that is what we tried to explain earlier. We understand that your intent was to make sure that people did what they were supposed to do, or were in compliance on November 8, but it was time to get the paperwork in. Some of the language could be fine-tuned better to make your intent clearer.

Mr. BROYHILL. I will be delighted to have your suggestions to accomplish that purpose, but I want to assure the chairman that the reason for this was to facilitate the paperwork flow, and that the facility must comply with such provision before November 8, 1985, and that is clearly stated in the proposed legislation.

Mr. FLORIO. The time of the gentleman has expired.

The gentleman from Minnesota is recognized.

Mr. SIKORSKI. Mr. Chairman, I have a real concern with the frustration level generated by this issue. This whole interim permit process began 9 years ago. It began as temporary, something final and something interim.

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In 1980, you started the regulations. In 1984, the GAO came out with a report claiming broad noncompliance, and Chairman Dingell had a hearing earlier this year focusing attention on this.

In late October, there is huffing and puffing, and then it was said a statutory response needs to be made, and it again allows for some interim action on interim permits that are not even supposed to be there in the first place.

We are supposed to be in a final permitting process, but for actions of the administrative agency, but for the EPA. Now, we are told that there are no reliable numbers as to the problem, no parameters on the problem.

We have got a big controversy as to what the Broyhill legislation does, but we seem to have no reliable figures as to the extent of the problem that the Broyhill legislation is intended to address.

Before we resolve a problem, it would be nice for the subcommittee to have the numbers of people that are affected, the numbers of entities affected by the legislation that is being proposed.

Mr. PORTER. Can I address that? I have asked my staff to give me a report every day at the close of business in terms of what came in that day's mail.

We have been tracking it for the last week or so, and we are getting a pretty good handle fairly quickly on which firms certified compliance with ground water monitoring, and which ones did not.

Mr. SIKORSKI. We are getting a lot of activity by virtue of this deadline. Maybe we shouldn't change the deadline then?

Mr. PORTER. We are getting pretty good data on a day-to-day basis, we had 110 last Thursday, 324 yesterday, and as the mail gets analyzed, so forth, the number of people certifying is increasing fairly dramatically, so that will tell us the black-white question as far as who certified, who did not.

The more difficult question is when you get into the insurance issue, what we are all saying here today is what we are concerned about those people who, as I keep saying, are otherwise impeccable, but couldn't get insurance.

Mr. SIKORSKI. We are concerned about equities, but my question is why are we spending so much time on what appears to be a very, very few instances?

Mr. PORTER. Well, that is——

Mr. SIKORSKI. I did not note any disagreement as to the equity of those that are in compliance on ground water, in compliance with the exception of capacity, or of insurance. They have the financial responsibility, they have got everything else covered with the exception of insurance, and those numbers, are apparently, very small.

Mr. PORTER. It depends on whether you are one of those companies. We think it is within this range——

Mr. SIKORSKI. No, my concern is the use of that equity to shoehorn a bunch of companies that should not be here asking for any interim relief from interim permitting requirements.

Mr. PORTER. That is the reason we have tried to come up and work with Congressman Broyhill's staff in the sense of crafting some language, in the sense of what people should get relief.

Someone who had to have insurance, for example, by January 1983 has had a long time. The insurance market was not con-

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strained in January 1983. A goodly number of these people, keep in mind, also can use the financial test. They don't need insurance.

Mr. SIKORSKI. There has been a lot of historical context put on, but all these firms were aware as of 1976, 1980, 1984, so if they didn't get into the insurance market when the rates were better, should we weep crocodile tears?

Mr. PORTER. Some of the people did not require insurance until January 1985. By January 1985, we were beginning to face a very constrained market for liability insurance.

Mr. SIKORSKI. They saved money before that, and now it is going to cost them more money now.

Mr. LUCERO. Congressman, I need to clarify some things. A number of the companies that are being affected are not companies who——

Mr. SIKORSKI. How many companies?

Mr. LUCERO. Our survey was accurate as best we could put it together as of August or September, and it is——

Mr. SIKORSKI. Mr. Lucero, we have had closed door, subpoena discussions on this, the whole operation at EPA a couple of years ago, and have since held open hearings talking about this, and it is very difficult for me to appreciate the level of understanding of the problem at EPA when you can't provide numbers.

Mr. LUCERO. Well, Congressman, what I am going to tell you is that the numbers that we have given you, which is a range of companies, between 30 or 35 to about 90, or the number is really between 50 and 100, when you round off.

Mr. SIKORSKI. Do you have any reason to question what our staff has done with regards to those 35 facilities?

Mr. FLORIO. The 35 is the list that EPA has given us. We have 35, 36 named companies at EPA. If the range is much more than that, are you prepared to give us the names, or is that just your guess?

Mr. LUCERO. I hope you appreciate that the provision that Congress did pass generated a great deal of concern on the part of a large number of companies in the ground water area.

When we made the assumptions to assess who might be able to certify, knowing that we couldn't predict in advance who was going to certify, we took the data that we put together back in April and May in response to the Dingell hearings. Since that time we know that some companies' ground water systems have been found inadequate, but we also know since that time there has been a tremendous amount of activity out in the regulated community to try to upgrade the ground water systems.

EPA and the States have not been able to go back and assess every facility since May as to whether they upgraded their system, but the way the law was written, it allowed them to certify.

They made the certification, and what I am going to tell you is that I expect that a large number of companies who we may have identified as having inadequate systems in April and May, based on a survey done even a couple months before may have improved their situation.

So I cannot tell you today——

Mr. SIKORSKI. And they may not have. If they have not proved it, it is by virtue of the deadlines imposed by statute. Now are we

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talking about putting maneuvering room back into those deadlines?

Mr. LUCERO. No, sir. What we are saying is, we still believe—and we have gotten a lot of anecdotal information to confirm our original estimate—that there are companies out there who are in compliance, spent the money to submit the part B, but for reasons beyond their control have been unable to get the insurance in the time frame that was required.

As both of the Congresswomen who testified at the beginning of the hearing point out, it can take now as long as 4 to 6 months to get approval of new insurance if you have never had it, which affects some of the companies who have become suddenly subject to the regulations in January; or have recently lost insurance.

We honestly believe that there is a group of people out there—and we will eventually go back and try to assess how many there were, in fact—but it will take some additional time; we will have to run the survey again. And in the meantime, we think it is important for Congress, as Congressman Broyhill has attempted to do, to say there are a group of people out there that a series of things start to happen to. First of all, they have lost their interim status.

Mr. SIKORSKI. I understand all of that, and the subcommittee understands all of that.

You are saying that we should act on anecdotal information to responses. If we had acted on that information a couple of years ago, there would be some people still at EPA who are not at EPA any longer. And if the justice process acted on anecdotal information, it would be even worse.

Second, why should we make legislative changes based on your anecdotal information when you are not in a position to make regulatory changes, or efforts based on that anecdotal information?

Mr. LUCERO. Congressman, we can go back over the points. The information is——

Mr. SIKORSKI. I would just like an answer. I don't need to go back over the points.

Mr. LUCERO. I can't answer your question.

Mr. BROYHILL. Would the gentleman yield to let me attempt to answer that?

Mr. SIKORSKI. Sure.

Mr. BROYHILL. The gentleman knows that there are some very—he calls them "anecdotal"—but there are actual cases out there of people who made a good faith effort to get liability insurance, and they can't get it. If we wait until all of this information is in, we are going to have a lot of these people out of business. They are not going to have the cash-flow to maintain their facilities properly; in other words, to continue managing them properly.

I will tell you what is going to happen. You are going to have a lot of people who will dispose of hazardous waste by illegal means, and that is not what we want to occur. It seems to me that we ought to at least have some interim remedy here providing that these people have a way to continue operating, as long as they can show that they are meeting all of the other requirements, and also show that they are making a good-faith effort to get the liability insurance.

Mr. FLORIO. Would the gentleman yield?

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Mr. BROYHILL. If the gentleman wants to wait for a year before all this information is put together, you will haye a lot of businesses that will be closed.

Mr. SIKORSKI. This gentleman doesn't want to wait for a year for anything. This gentleman wants some information. And I have heard a lot. I have heard five. I have heard a couple instances talked about. And we get back in the circle.

We are only getting this information because the deadlines have run, and now the knee-jerk response is to extend the deadlines, and I am uncomfortable legislating in a vacuum. I think the inherent handicaps of that process are here deposited before us right now.

Mr. FLORIO. Would the gentleman yield?

This is essentially a regulatory problem that we are talking about, what constitutes financial responsibility. And some, including apparently EPA, at this point, are asking for statutory changes when this regulatory problem——

Mr. BROYHILL. Just a second. Nobody is asking for a statutory change, Mr. Chairman.

Mr. FLORIO. On the basis of what the gentleman indicated to us before, the statutory change is embodied in the gentleman's legislation, which is a statutory change from compliance with the existing law, which has been the law for a period of time.

What I am suggesting is this should have been dealt with in a timely fashion through the regulatory process that didn't even begin until August 21 of this year; that, clearly, you are intending to go forward with a regulatory change in redefining financial security to allow people to qualify in other ways, as an alternative to the existing system. But we had notice last year; and yet, the process didn't even begin until August 21.

You are saying it is complicated. You can't give us the defined categories.

How do you expect us to pass statutes exempting people from the law on the basis of facts when you don't have the facts from mere regulatory change? That is the point I would like to identify with, that the gentleman from Minnesota emphasized.

Where has anybody been up until August 21?

One final question: When do you anticipate completion of the regulatory process, which would solve all these problems, I would hope?

Mr. LUCERO. It won't, Congressman.

One of the things that Dr. Porter tried to make clear is that a regulatory change before November 8, or a regulatory change after November 8, will not solve the problem that we have tried to identify for you.

Mr. FLORIO. Why not?

Mr. LUCERO. The firms that were not able to certify as to compliance with the financial responsibility requirements on November 8 have automatically lost interim status. We cannot restore that administratively. Therefore, they must begin closure procedures and they run the risk of civil and criminal penalties.

As to whether EPA could have made a change that would have allowed these particular companies some other mechanism, we concluded that the liability provisions were very important and that they should be maintained, based on the comments; that it was un-

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fortunate that the statutory provision that terminated loss of interim status worked in such a way that a certain group were going to lose interim status.

We still think the liability requirement is very important, and what we have been suggesting and what the bill has attempted to do is not change the liability requirement, the liability insurance requirement, but to give an additional period of time in which to make that certification; in other words, in which to get liability insurance.

Mr. FLORIO. Without any awareness of your changing the regulations to redefine liability?

Mr. LUCERO. Right now, EPA is of the opinion, based on the comments and our own agency's—we still believe the liability insurance requirements are important.

Mr. SIKORSKI. How are these companies going to get liability insurance?

Mr. FLORIO. Even 2 years from now?

Mr. SIKORSKI. If they didn't get it before under the same regulatory structure—and then November 8 has come and gone. And, technically, they are in a default situation that would scare agents, or companies, if they are going to be scared at all.

How, in that context, are they going to get insurance after November 8, rather than before?

Mr. LUCERO. We have felt that the liability insurance requirement was an important aspect of doing business.

Mr. SIKORSKI. I understand that. So do I.

Mr. LUCERO. We think if that requirement were removed—first of all, the insurance industry is in a down part of its cycle. It is not clear whether it has hit the bottom. But it is a historical pattern. We know that that is true. We have been told that by a large number of insurance company representatives.

Because of Superfund, we discussed why they are in their current problem. After the industry has a period of time in which to reestablish itself financially, it can and will consider returning—the reason the liability insurance requirement is important is that there will be few incentives to reenter that market on the industry if it is removed, and that is one of the reasons I felt it was extremely important not to suspend the regulations.

Mr. SIKORSKI. I understand. There is some logic there. And I support your conclusion, not suspending the regulation.

But my question is, What has happened, between November 8 and the time that the companies in trouble get insurance, that will make it more likely for them to get insurance? The horrible things that you outline that will be triggered on November 8, these are not likely to engender greater faith on the part of these insurance companies.

Mr. LUCERO. I think you will hear that people are looking for alternatives in addition to the private insurance market to provide insurance. And one of the things the requirement for liability insurance appears to be doing is pushing the search for alternatives.

Mr. SIKORSKI. You just told me why these interim suspensions or exemptions to interim permitting processes are problematic for me. And I think from the public standpoint it is problematic that we are asking to delay a deadline for something that is very, at mini-

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mal, ephemeral—a hope that the insurance market generally is going to pick up.

Mr. FLORIO. The time of the gentleman has expired.

The gentleman from Pennsylvania.

Mr. RITTER. Following up on the gentleman from Minnesota, you had mentioned several alternative mechanisms for demonstrating this kind of financial responsibility such as letters of credit.

Could you describe how these could fill the gap in each case?

Mr. LUCERO. Those are options available, and they were ideas that were suggested, by the way, in the comments that we received.

The corporate guarantee, for example, would be where the particular company or firm that owns and operates the landfill is a subsidiary to a parent, a parent which has enough assets to provide a guarantee to the limits of coverage that are necessary.

The other ideas involve third-party financial institutions providing a letter of credit or some type of agreement to assure that they will meet the liability requirements.

There are advantages and disadvantages to both of those, and those are things we are going to consider as part of the rulemaking we started. They may provide limited assistance to some additional people in that category that could not certify, because they didn't have liability insurance. But it does require that they have a parent that can provide this guarantee, and goes further; that they find a financial institution that is going to somehow agree to finance this.

There may be very large costs associated, perhaps even larger than what it would take to get insurance. And if there is a period of time, some companies will be able to take advantage of this into the future, and that should help.

We still feel—and based on a lot of discussions with the insurance industry—that the continued presence of this regulation will bring some of this market back. It will be difficult to get, expensive to get; but it is going to take a couple of years to do.

Mr. FLORIO. Would the gentleman yield?

I am really confused, because you are saying—and I am glad you are saying—that the regulations perhaps can be expanded. We would have hoped that would have been done to avoid a crisis so as to redefine letters of credit, et cetera, and all of that would have helped some of these people.

Then, your concluding point was that you don't support suspension because you feel that—and this is Mr. Sikorski's point—the existence of these deadlines has in fact forced people to look for new ways of complying with the financial security provisions, or getting rid of waste in some other appropriate ways.

I am not sure where you come down.

Mr. LUCERO. The term "suspension of the regulation" would be to say that the liability requirement no longer applies under the RCRA program.

The proposal is not to suspend those requirements. It is to provide an extension of time to make the required certification. And I hope I have not been confusing the terms. We are supporting the extension.

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We are not supporting the suspension of the regulation or of the requirement, and we have been going back and forth, and that has created confusion, and I am sorry.

We support the extension. We do want that particular requirement to stay in place.

Mr. FLORIO. Isn't the effect of the extension a suspension of applicability of the law as of November 8 such that you are going to continue to be able to operate, notwithstanding the failure to have financial security requirements met?

Mr. LUCERO. If it were an unlimited extension, I would say that may be right.

Mr. FLORIO. The 2-year extension suspension?

Mr. LUCERO. Our suggestion had been a 1-year suspension, and the idea had been that with the recognition that that were coming, plus the fact that we believe there will be an upturn in the insurance availability, that the constant pressure would keep people looking for insurance, and that is what we are after.

Mr. FLORIO. I thank the gentleman for yielding.

Mr. RITTER. People talked about a moving target and companies were coming onboard, however, all of a sudden, it was becoming known they were not coming onboard to comply.

There is also the moving target of the insurance industry. Things are changing so rapidly there; that it is not altogether certain when and if these alternative mechanisms must be taken up, because the insurance industry and its ability to respond is not a certain thing.

Isn't that correct?

Mr. LUCERO. I guess I would have to agree with that.

Mr. PORTER. Sure.

Mr. RITTER. Some of these things are going to become much more necessary when there is some definitive stand of the insurance company; a "go" or "no go" situation. And the changes are happening so fast, we don't know that.

I am concerned—let me ask you this: Is it possible that what we are witnessing here is the tip of some new iceberg, market changes in the industry? With all the deadlines that we have and all the regulatory uncertainties, are we about to witness some tide of the insurance industry pulling back and pulling away from these particular kinds of situations?

Mr. PORTER. It is hard to speak to that very definitively.

One thing I kept asking over the last few months is: Are people getting insurance? The answer is yes, some people are. Some people are doing pools. Trade associations are doing some fairly creative things.

It is a difficult, very difficult ball game right now, but we believe the pressure needs to be kept on. The insurance industry has to learn a lot more about the risks of waste disposal. But for us to think there is some sort of fix to the whole problem other than insurance, we are not sure that is there.

We think the majority of the people—I want to stress this—can apparently use other means than insurance. We are talking about the minority to begin with here. Anyone who reads the papers knows there is a crisis in all kinds of liability insurance. We believe—and hope we are right—we have reached the bottom of this.

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We are going to work very hard with the insurance companies to explain the risks so they can do a better job of quantifying what happens in this business, so they can write insurance, because there is no panacea for this small group of people that can't financially assure.

Mr. RITTER. Let me ask if it is possible that an unintended result of this policy would be to take a lot of the smaller firms out of the business? Isn't that one of the alternatives, with the 10 million tangible net worth figure that everybody is going to raise to become larger than 10 million? Isn't the insurance company going to look at the smaller companies and say, "Well, you know, you are not a good risk," and the companies are going to respond, "It is too difficult to get insurance. Let's merge or do something else."

Is this going to have a substantial effect on the structure of the industry?

Mr. PORTER. I think that is happening to some extent. One of the tensions I have got is that my understanding is what the Congress has said is they want people in the hazardous waste disposal business who are financially capable.

Mr. FLORIO. The list of 35, there are no commercial hazardous waste people on that.

Mr. RITTER. It is not just the commercial industry, but it is anybody who deals with chemicals or chemical products that has hazardous waste. Are we saying that below a certain size is a very tricky business?

Mr. PORTER. I think we could certainly say it has gotten very expensive to manage hazardous waste, but at the levels the Congress has mandated, that is what is going to happen.

Mr. RITTER. The strength of this country is in the growth of its small businesses and to the extent that these companies have to start small and that $10 million is already quite large for a startup, we have to be really careful that we just don't wipe out the innovation in the chemical industry—and chemicals are a kind of grease for gears of modern technology—by the unintended effects of legislation and regulation of this kind. I am concerned.

Mr. FLORIO. The time of the gentleman has expired.

Does the gentleman from New Mexico seek recognition?

Mr. RICHARDSON. No, Mr. Chairman. I have a statement I would like to insert for the record.

Mr. FLORIO. It will be inserted.

Mr. Eckart of Ohio will submit questions.

Playing off the important comments of the gentleman from Pennsylvania, if we are talking about a relatively small universe, we are talking about relatively small companies because there seems to be no problem in the commercial hazardous waste management industry. Those are big people and can meet the assets test. We are talking about relatively small companies. Have you given consideration at all to you insuring those companies? Obviously you have gone into that business. You have been involved in the indemnification insurance business with regard to clean sites, I think.

If you are talking about a small universe and small businesses, have you given any thought to that approach since you have al-

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ready crossed over the threshold by going into the insurance business for one entity?

Mr. PORTER. We gave it some thought. We will be happy to think about that further. It is not a business the EPA is geared to administer and be in that business.

Mr. FLORIO. You are in it.

Mr. PORTER. In a sense, you are right.

Mr. FLORIO. There is no question; you are in it.

Mr. RITTER. It is an interesting point and also a highly uncertain situation. The idea of the Federal Government becoming the lead insurance agency for a whole host of companies opens the potential of a real deep pocket and I think the gentleman's own ideas in the past have been to have the system try to pay for itself, to rationalize a system that does pay for itself.

Mr. FLORIO. I agree with the gentleman 100 percent and that was part of the reasoning for suggesting that I had some questions about when EPA went into this business in the first place—aside from the legal authority to use Superfund moneys for indemnification of private parties, I had questions——

Mr. RITTER. I wondered what the gentleman meant by "EPA going into this business." We in this Congress have brought EPA into this business lock, stock and barrel.

Mr. FLORIO. I would put into real serious question whether we did that. There were controversies when EPA decided to utilize Superfund moneys for insurance indemnification for private operation and some of us were on the record as saying that we didn't think there was such authority. It is there, presumably there are legal documents holding EPA responsible as an insurance indemnifier.

I am concerned if you have gone down that road a little bit you have a crisis that prompts the concerns of people in Washington and Congress, whether you are considering going into the insurance business on a larger scale than you have, and you say you have given it thought but you haven't perfected the approach. We would like to be kept involved in your deliberations as you go into the area of thinking about becoming insurers.

Mr. PORTER. Certainly.

Mr. RITTER. I wonder if EPA didn't indemnify its contractors—whether at some point we would have any contractors doing the work for EPA. I mean at some point——

Mr. FLORIO. As you can appreciate, that is a fairly radical authority that EPA is going to enter into, contracts with people who do services with the Government and then indemnify them for liability that they experience and particularly those of us who are more conservative feel that that is not something the Federal Government should be involved with.

Mr. RITTER. But the point is that if EPA had the staff and had the earth-moving equipment and had the necessary facilities, they would do it themselves and, of course, they would then be responsible at some point. They are not that big——

Mr. FLORIO. If the gentleman would yield, I don't have any difficulty with EPA contracting out to do these things, but the idea that EPA should be insuring against liability in the instance of particular private parties and now apparently considering indemni-

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fication for other private parties, I think is a fairly new innovative development that I am not particularly comfortable with.

Mr. PORTER. We don't have active consideration to do that. It has crossed our mind, but we are certainly not thinking seriously about going into that business.

Mr. FLORIO. Let me thank both the witnesses for being here this morning. I am going to call the last panel of witnesses and remind us that we are under time constraints, that we are required to vacate the room by 12:30.

I will ask Linda Greer, staff scientist, Toxic Chemicals Program, Environmental Defense Fund; Robert G. Smerko, president, American Wood Preservers Institute; and Richard C. Fortuna, executive director, Hazardous Waste Treatment Council, to come forward.

Their statements will be put in the record in their entirety and we ask them to provide a summary to us and we will adhere strictly on the questioning periods for the Members of Congress.

Mr. BROYHILL. I want to make sure my initial statement is in the record.

Mr. FLORIO. Without objection, statements from all the Members will be put into the record at the beginning of the hearing.

Mr. FLORIO. Ms. Greer.

STATEMENTS OF LINDA E. GREER, STAFF SCIENTIST, TOXIC CHEMICALS PROGRAM, ENVIRONMENTAL DEFENSE FUND; ROBERT G. SMERKO, PRESIDENT, AMERICAN WOOD PRESERVERS INSTITUTE, ACCOMPANIED BY WALTER G. TALAREK, GENERAL COUNSEL, AND JAMES MORRISS, EXECUTIVE VICE PRESIDENT, TEXAS ELECTRIC COOPERATIVE; AND RICHARD C. FORTUNA, EXECUTIVE DIRECTOR, HAZARDOUS WASTE TREATMENT COUNCIL, ACCOMPANIED BY RIDGWAY M. HALL, JR., GENERAL COUNSEL

Ms. GREER. Good morning. I am Linda Greer, a scientist with the Toxic Chemicals Program of the Environmental Defense Fund. I haven't had an opportunity to revise my testimony further, but it won't take long for me to go through the whole thing.

Section 3004(a)(6) of RCRA, as amended, requires EPA to establish financial responsibility standards for owners and operators of hazardous waste management facilities as may be necessary or desirable to protect human health and the environment. These financial responsibility requirements are critically important ot the success of the RCRA Program for three major reasons.

First, and most important to people living around dump sites, the financial provisions provide compensation assurances. The public is deservably wary of hazardous waste operators who continue in business but cannot afford to pay for any damages that may cause to the health or property of the surrounding residents.

Second, the financial provisions provide third-party oversight on facility operations. Given the loopholes in the existing EPA regulations, it is important to give facilities meaningful performance reviews. The insurance industry, because they must cover damages caused by these facilities, is in an excellent position to do this review.

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Third, insurance will provide an early warning to regulating agencies about poor facility performance; notification of the cancellation of insurance will let the agencies know that something is amiss.

In fact, there is widespread support for the need for financial requirements by more than the public living around these sites. For example, when EPA questioned in 1981 whether the financial requirements were necessary or desirable, it received considerable comment from the public, regulated industries, insurance companies, Members of Congress, and State agencies in support of them.

Central to today's debate, though, is not whether financial requirements are a good idea, but whether or not they are causing larger problems than they were designed to solve. In particular, this hearing is being held in response to a general perception that there is a financial crisis with hazardous waste facilities due to a tightening market for insurance.

The concerns to date have focused on the abiity of facilities to certify compliance with financial requirements on November 8 of this year. EDF has reviewed much of the information that EPA and Congress has before it and we have reached the conclusion that the reported financial crisis may not, in fact, exist. In spite of what has been reported in the press, there does not appear to be any cause for alarm, and there is little to suggest the need for any emergency legislative response or as I will discuss later any legislation at all.

I ask you to refer to attachment 1 which is a summary done by EPA itself while I present the analysis that led us to our conclusions. That is at the back of my testimony.

There are 1,574 hazardous waste land disposal facilities currently in the RCRA Program. Of these 1,574 facilities, a majority—938—do not need insurance because they are large enough to meet a financial test to meet the financial requirements.

Only 215 facilities nationwide in fact require insurance—once you subtract out 420 facilities exempt from the requirements for various reasons. Of these, only 113 are known not to have it.

According to the EPA data, then, we are down to a potential problem with 113 of 1,574 or only 7 percent of our RCRA facilities. Hardly a crisis of national proportions. But let's keep looking.

Of the 113 facilities without insurance, a full 67 percent, or 76 facilities, have never had insurance. Thus, the majority of our facilities without insurance as of this survey were in fact not at all victims of a new insurance market or a new economic reality. Rather, they appear to be facilities that were not interested in complying with the requirements even when it was relatively easy to do so. Subtracting the perpetual noncompliers from the pack of 113, we are down to only 37 facilities out of 1,574 that can claim that the changes in the insurance industry have affected their operations.

Even ignoring compliance history, let us look further at the 113 facilities. Are these 113 facilities being kept from disposing their wastes unfairly? Are they the types of facilities that the new RCRA is encouraging or discouraging?

Two questions must be answered to determine this response. The first has been addressed by EPA: Are these facilities in compliance

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with other RCRA interim status requirements especially those for ground water monitoring?

Significantly, the answer is no for the vast majority; only 36 of the 113 facilities had adequate well systems at the time of EPA's most recent survey. That is, if our ground water data is correct, only 36 facilities are having RCRA certification problems due solely to insurance.

Now let us ask an additional important question about these 36 facilities that EPA has not yet asked. Have they contaminated the ground water? As you know, the RCRA regulations require only that a facility monitor the ground water. The regs do not require that the facility not contaminate it. Thus, it is common that facilities can be in compliance with ground water monitoring requirements and still be contaminating the ground water.

A cross check of the 35 facilities with adequate wells and no insurance with those facilities found to have contaminated the ground water in the Dingell survey of this spring reveals that fully 61 percent of the 35—that is, 22 out of 35—have already contaminated the ground water.

Thus, the reason that these facilities cannot get insurance may be because they are extraordinarily poor risks. They are the equivalent of burning buildings requesting fire insurance; they deserve to be turned down.

In fact, the insurance market may be sending us a message about land disposal facilities that we have heard before in other arenas: land disposal of hazardous waste in these facilities is too risky to be insurable. We know that all land disposal facilities eventually will leak and we know how expensive it can be to clean up after contamination has occurred. Under these circumstances it is not surprising that insurers would deem certain facilities to be so risky as to be uninsurable. This does not mean that we have a crisis on our hands, for sufficient alternatives exist to handle hazardous waste disposal in ways that will not eventually shift cleanup costs to the public.

Although we have heard threats from the insurance industry that they no longer want to insure hazardous waste facilities, the only hard information we have before us today in fact suggests the contrary. EPA data shows that the insurance companies have been selective about whom they will grant insurance to. As a result, a small number of facilities failed to have insurance on November 8, and many of these facilities appeared to have already contaminated the environment.

In addition, EPA noted in its August 21, 1985, Federal Register notice that despite the recent publicity about the lack of insurance, the Pollution Liability Insurance Association has had a recent increase in its sales of Environmental Impairment Liability policies. Thus, there is little data to support claims about insurance availability to date.

In light of the information available to us at this time, we recommend no legislative changes in RCRA to address the insurance problem. The number of inequitable situations that may have caused closures on Friday should instead be carefully examined on a case-by-case basis, and site-specific remedies and enforcement discretion can be considered by EPA.

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Under absolutely no circumstances should any legislative solution be put forth for facilities that were not in compliance with ground water monitoring provisions on November 8. There is no excuse for their lack of compliance on this date, as the installation of ground water monitoring wells is totally under company control.

Before closing, I would like to review where we are in the RCRA Program today and where we need to be several years from now. Last year at this time, Congress reacted boldly to the problems it saw with our Nation's operating hazardous waste dump sites and strengthened the provisions of RCRA. The strengthening provisions were designed to eliminate bad facilities by causing them to upgrade their design, be better operated, or close.

On Friday, November 8 of this year, the first set of significant new directives went into effect. There was a loud cry from some members of the regulated community complaining that they were closing. Many members of the press and Congress forgot that RCRA was meant to close down bad facilities and covered the story as though it was bad news.

But I remind you, closing hazardous waste land disposal facilities is not always bad. In fact, it is absolutely necessary to rid RCRA of its poor facilities so that it can improve. In the case we have reviewed today—the impact of November 8—the impact appears to have been a weeding out of land disposal facilities not willing or able to pay to operate in a sound manner. That is good, not bad.

Times have changed in hazardous waste management, and changing is never easy. But it is change that we clearly require for improvement in hazardous waste. As RCRA's first major milestone is implemented, let us not lose our resolve to make necessary change in how we manage this Nation's hazardous waste. And by all means let us not move to solve "problems" when those problems are actually examples of our success.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Greer follows:]

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TESTIMONY OF

LINDA E. GREER

ENVIRONMENTAL DEFENSE FUND

Good morning. My name is Linda E. Greer, and I am a scientist with the Toxic Chemicals Program of the Environmental Defense Fund (EDF). EDF has been actively involved in the development of the hazardous waste regulatory program under the Resource Conservation and Recovery Act (RCRA) since its inception. In 1978, EDF sued EPA to force compliance with RCRA's mandate to promulgate hazardous waste regulations. Since that time, EDF has filed hundreds of pages of comments on those regulations, filed suit on numerous occasions over weaknesses in the regulations, and has appeared often before the Congress, including this Subcommittee. In addition, EDF worked actively throughout the last legislative session to improve the RCRA law during its reauthorization by Congress and actively supported many of the strengthening amendments to RCRA, including those concerning financial responsibility which are the subject of today's hearing. We very much appreciate the opportunity to appear before you today.

Section 3004(a)(6) of RCRA, as amended, requires EPA to establish financial responsibility standards for owners and operators of hazardous waste management facilities as may be necessary or desirable to protect human health and the environment. These financial responsibility requirements are critically important to the success of the RCRA program for three major reasons. First, and most important to people living around dumpsites, the financial provisions provide compensation assurances. The public is deservably wary of hazardous waste operators who continue in business but cannot afford to pay for any damages they may cause to the health or property of the surrounding residents. Second, the financial provisions provide third party oversight on facility operations. Given the loopholes in the existing

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EPA regulations, it is important to give facilities meaningful performance reviews. The insurance industry, because they must cover damages caused by these facilities, is in an excellent position to do this review. Third, insurance will provide an early warning to regulating agencies about poor facility performance: notification of the cancellation of insurance will let the agencies know that something is amiss.

In fact, there is widespread support for the need for financial requirements by more than the public living around these sites. For example, when EPA questioned in 1981 whether the financial requirements were necessary or desirable, it received considerable comment from the public, regulated industries, insurance companies, members of Congress, and State agencies in support of them. In fact, particularly significantly for this town, there was virtually unilateral support for the financial requirements at that time.

Central to today's debate, though, is not whether financial requirements are a good idea but whether or not they are causing larger problems than they were designed to solve. In particular, this hearing is being held in response to a general perception that there is a financial crisis with hazardous waste facilities due to a tightening market for insurance. The concerns to date have focussed on the ability of facilities to certify compliance with financial requirements on November 8 of this year. EDF has reviewed much of the information that EPA and Congress has before it and we have reached the conclusion that the reported financial crisis may not, in fact, exist. In spite of what has been reported in the press , there does not appear to be cause for alarm, and there is little to suggest the need for any emergency

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legislative response. Please refer to Attachement 1, a summary done by EPA, while I present the analysis that led us to our conclusion.

* There are 1574 hazardous waste land disposal facilities currently in the RCRA program. Of these 1574 facilities, a majority - 938 - do not need insurance because they are large enough to meet a financial test to meet the financial requirements.

* Only 215 facilities nationwide in fact require insurance (once you subtract out 420 facilities exempt from the requirements for various reasons). Of these, only 113 are known not to have it.

According to the EPA data, then, we're down to a potential problem with 113 of 1571, or only 7%, of our RCRA facilities. Hardly a crisis of national proportions. But let's keep looking.

* Of the 113 facilities without insurance, a full 67%, or 76 facilities, have never had insurance. Thus, the majority of our facilities without insurance as of this survey were in fact not at all victims of a new insurance market or a new economic reality. Rather, they appear to be facilities that were not interested in complying with the requirements even when it was relatively easy to do so. Subtracting the perpetual non-compliers from the pack of 113, we are down to only 37 facilities out of 1574 that can claim that the changes in the insurance industry have affected their operations.

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Even ignoring compliance history, let us look further at the 113 facilities without insurance as of EPA's survey this fall. Are these 113 facilities being kept from disposing their wastes unfairly? Are they the types of facilities that the new RCRA is encouraging or discouraging? Two questions must be answered to determine this response. The first has been addressed by EPA: are these facilities in compliance with other RCRA interim status requirements, especially those for groundwater monitoring? Significantly, the answer is "no" for the vast majority; only 36 of the 113 facilities had adequate well systems at the time of EPA's most recent survey. That is, if our groundwater data is correct, only 36 facilities are having RCRA certification problems due solely to insurance.

Now let us ask an additional important question about these 36 facilities that EPA has not yet asked. Have they contaminated the groundwater? As you know, the RCRA regulations require only that a facility monitor the groundwater. The regs do not require that the facility not contaminate it. Thus, it is common that facilities can be in compliance with groundwater monitoring requirements and still be contaminating the groundwater.

A cross check of the 36 facilities with adequate wells and no insurance with those facilities found to have contaminated the groundwater in the Dingell survey of this spring reveals that fully 61% of the 36 (that is, 22 out of 36) have already contaminated the groundwater. (See Attachment 2.) Thus, the reason that these facilities cannot get insurance may be because they are extraordinarily poor risks. They are the equivalent of burning

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buildings requesting fire insurance: they deserve to be turned down.

In fact, the insurance market may be sending us a message about land disposal facilities that we have heard before in other arenas: land disposal of hazardous waste in these facilities is too risky to be insurable. We know that all land disposal facilities eventually will leak and we know how expensive it can be to clean up after contamination has occurred. Under these circumstances it is not surprising that insurers would deem certain facilities to be so risky as to be uninsurable. This does not mean that we have a crisis on our hands, for sufficient alternatives exist to handle hazardous waste disposal in ways that will not eventually shift cleanup costs to the public.

Although we have heard threats from the insurance industry that they no longer want to insure hazardous waste facilities, the only hard information we have before us today in fact suggests the contrary. EPA data shows that the insurance companies have been selective about whom they will grant insurance to. As a result, a small number of facilities failed to have insurance on November 8, and many of these facilities appeared to have already contaminated the environment. In addition, EPA noted in its August 21, 1985 Federal Register notice that despite the recent publicity about the lack of insurance, the Pollution Liability Insurance Association has had a recent increase in its sales of Environmental Impairment Liability policies. Thus, there is little data to support claims about insurance availability to date.

In light of the information available to us at this time, we recommend no legislative changes in RCRA to address the insurance problem. The number of

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inequitable situations that may have caused closures on friday should instead be carefully examined on a case by case basis, and site-specific remedies and enforcement discretion can be considered by EPA.

However, if Congress decides to legislate a solution, it is important that the legislation have the following elements: 1) The facility should have failed to certify on November 8 solely because of insurance. That is, the facility must have been in compliance with groundwater monitoring requirements on that date. 2) Re-entry to the system should be allowed only for facilities that can demonstrate that they tried to get insurance by November 8 and were denied this insurance only because of the problems in the market. It is critically important to us that high risk facilities not be allowed back into the RCRA system via this legislative fix. 3) Extension of interim status should be temporary, for example a period of six months. 4) The facility should not be granted re-entry unless it poses no risk to human health and the environment.

Under absolutely no circumstances should any legislative solution be put forth for facilities that were not in compliance with groundwater monitoring provisions on November 8. There is no excuse for their lack of compliance on this date, as the installation of groundwater monitoring wells is totally under company control.

Modifications we suggest EPA consider for its regulations include its proposed corporate guarantee modification and not the suspension of the requirements for these facilities or the lowering of the required levels of

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coverage, as acting on these two latter options seriously undermine the benefits that the financial requirements can provide us.

Before closing, I would like to review where we are in the RCRA program today and where we need to be several years from now. Last year at this time, Congress reacted boldly to the problems it saw with our nation's operating hazardous waste dumpsites and strengthened the provisions of RCRA. The strengthening provisions were designed to eliminate bad facilities by causing them to upgrade their design, be better operated, or close. On Friday November 8 of this year, the first set of significant new directives went into effect. There was a loud cry from some members of the regulated community complaining that they were closing. Many members of the press and Congress forgot that RCRA was meant to close down bad facilities and covered the story as though it was bad news. But I remind you - closing hazardous waste land disposal facilities is not always bad. In fact, it is absolutely necessary to rid RCRA of its poor facilities so that it can improve. In the case we've reviewed today - the impact of November 8 - the impact appears to have been a weeding out of land disposal facilities not willing or able to pay to operate in a sound manner. That is good, not bad.

Times have changed in hazardous waste management, and changing is never easy. But is is change that we clearly require for improvement in hazardous waste. As RCRA's first major milestone is implemented, let us not lose our resolve to make necessary change in how we manage this nation's hazardous waste. And by all means let us not move to solve "problems" where those problems are actually examples of our success.

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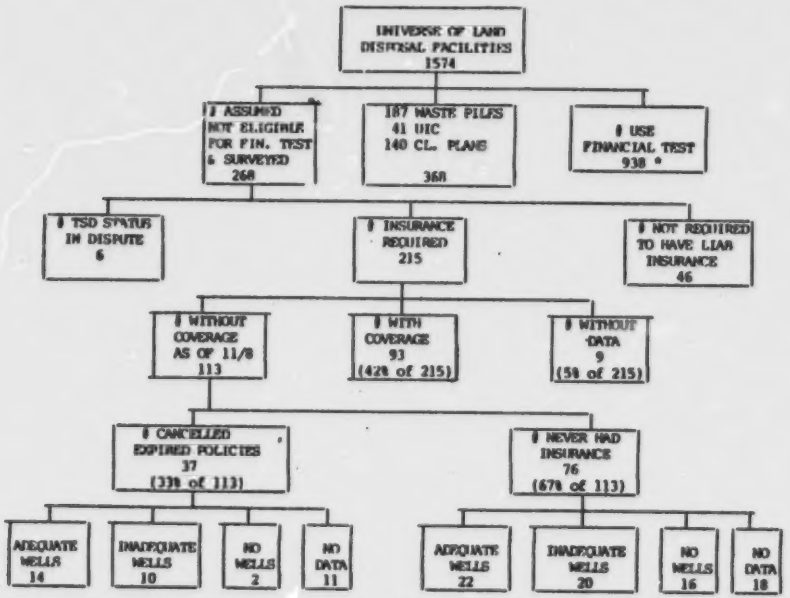
LAND DISPOSAL FACILITIES


UNIVERSE OF LAND DISPOSAL FACILITIES 1574
ASSUMED NOT ELIGIBLE FOR FIN. TEST & SURVEYED 268
187 WASTE PILES 41 UIC 140 CL. PLANS 368
USE FINANCIAL TEST 938 *
TSD STATUS IN DISPUTE 6
INSURANCE REQUIRED 215
NOT REQUIRED TO HAVE LIAB INSURANCE 46
WITHOUT COVERAGE AS OF 11/8 113
WITH COVERAGE 93 (42% of 215)
WITHOUT DATA 9 (5% of 215)
CANCELLED EXPIRED POLICIES 37 (33% of 113)
NEVER HAD INSURANCE 76 (67% of 113)
ADEQUATE WELLS 14
INADEQUATE WELLS 10
NO WELLS 2
NO DATA 11
ADEQUATE WELLS 22
INADEQUATE WELLS 20
NO WELLS 16
NO DATA 18

ESTIMATE OF FACILITIES AFFECTED SOLELY BY THE CONSTRAINED INSURANCE MARKET

LOW = 14 + 22 = 36

HIGH = 14 + 10 + 11 + 22 + 20 + 18 = 95

BEST ESTIMATE = 50

Attachment 2

Facilities with no insurance that have adequate groundwater wells

(Astericks indicate groundwater contamination has already occurred.)

AL Courtaulds North America
* CT Harper Leader
* GA Production Plating
IN Midwest Steel
IN Adams Sanitary Landfill
KS Williams Pipeline
* LA Colfax Concrete
* MS Vertac Chemical
* MT Transabas Inc
OH NCR Corporation
* SC Stoller Chemical
* SC Roy Metal Finishing
TN Sanymetal Products
* TX Texas Electronic Cooperatives
OH Fei Land Farm #2
* AR Tosco
* CT Birken Manufacturing
* CT Plainville Electro-Plating
FL A-AAA Printing Ink Company
* LA Madisonville Wood Preservers
* MI Buckeye Products
MI Quanex Corporation
* MS First Chemical Corporation
MS Rogers Rental Landfill
* NC John Boyle & Company
* NC Galvan Industries
ND Flying J.
* OK Chemical Resources
* OK Oklahoma Refinery
TN Langdale Company
* TX Texas Electric
TX Ohmstede Works
* TX Gary Aircraft
TX Signor Refinery
* VA Wheelabrator Frye

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Mr. FLORIO. Thank you very much. Mr. Smerko.

STATEMENT OF ROBERT G. SMERKO

Mr. SMERKO. On my right and your left is Mr. Walter G. Talarek, general counsel for the institute; and Mr. James Morriss, executive vice president of the Texas Electric Cooperative, which is a member of AWPI.

Thank you for giving the American Wood Preserves Institute the opportunity to present its testimony before this subcommittee. I will summarize our written testimony which I respectfully request be made a part of this hearing's record.

During my testimony, we are going to, I think, muddle up a little bit more the numbers that have been talked about this morning because of information that came to our attention yesterday. This morning you have talked only about the November 8 problem. Well, there is another problem that we need to address.

The wood-treating industry is made up mostly of small businesses. In 1984, there were 428 companies operating 544 plants in the United States.

Wood treating is one of the industries in the United States most severely impacted by environmental regulations. Our industry is an old industry, whose past practices for managing waste, while in keeping with the environmental thinking and requirements of earlier times, were clearly not up to today's environmental standards.

The wood-treating companies represented by AWPI fully realize their environmental responsibilities, and are working to meet them. Our member companies are committed to cleaning up waste from past operations, and they are committed to operating their plants according to today's standards.

Furthermore, we have absolutely no quarrel with the policy that Congress set in 1976, to assure that the cost of compensating any injury to human health or damage to the environment, caused by the escape of hazardous waste, would be borne by the responsible party. Our difficulties lie in the current implementation and administration of this policy now that the environmental impairment liability insurance market has all but disappeared.

Although the November 8 deadline adversely impacts an apparently small number of wood treaters—we have identified 6 through a nonscientific survey of about 60 treaters—it presents a problem that, in all fairness, should be resolved. I should add that yesterday we became aware that seven treaters in Alabama might have to close down because of the lack of insurance. I say might because we have not investigated those situations ourselves and we will be doing so.

Mr. Morriss represents one of the six wood treaters, the first six that I mentioned, and will be pleased to address your questions regarding the situation at the Texas Electric Cooperative and I do hope you have some questions for him.

The November 8 deadline also serves to focus attention on the larger, potentially more serious problem caused by the general unavailability of liability insurance to small businesses that treat, store, or dispose of hazardous waste.

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Now it can be argued that some wood treaters presently do not have TSD units and that other wood treaters can take action to eliminate their present TSD units while not having to cease operations for a lengthy period of time. These arguments may be true in some situations, but not all. The point is, however, EPA presently has in progress a rulemaking, that will eventually capture virtually all wood-treating facilities in the RCRA hazardous waste management system. Every plant could become a TSD operation. When this occurs and insurance or alternatives are not available, many wood treaters might have to cease operations.

The insurance problem has become so severe in the wood-treating industry, that even facilities with TSD units that present minimal risks to human health and the environment, cannot either obtain or retain the required coverage at reasonable rates. For example, a wood-treating company in the Southeast that has a permitted container storage area, now has only one-half the required coverage for sudden accidental occurences. Moreover, the company has been notified by its carrier that it will lose all of its coverage, when its policy comes up for renewal in September 1986.

Another example is the wood-treating company in the Northwest that presently pays $100,000 per year for coverage for sudden accidental occurences on a permitted, above-ground tank storage unit. This company has been notified by its carrier, that in order to retain this insurance beyond the renewal date of March 1986, it must have a $15,000 engineering study conducted by a firm named by the insurance company. Furthermore, the premium for the policy for the renewal period will be between 50 and 225 percent greater than the present premium.

We hope that Congress and EPA will act soon to remedy the current situation and head off the impending problems for the wood-treating industry caused by the unavailability of insurance. We believe that Congress, EPA and the involved industries should begin to explore in a cooperative manner potential remedies.

First and foremost, we support H.R. 3692 and we hope Congress acts quickly to enact it as this bill provides immediate relief from the November 8 problem. In addition, we have some barebones suggestions to make to deal with the other problems. While there may be little new in what we have listed as suggestions in our written testimony, we would hope these suggestions merit the careful analysis by the Congress, EPA, and others.

We would be pleased to work with this subcommittee to put together a concrete proposal based on our list or on other ideas.

The very large environmental debt carried by most companies in the wood-treating industry can be satisfied given the time and resources.

In general, the large companies in the AWPI membership have been moving quickly to clean up and to get on with running their business. They are in a position to meet all requirements, including the financial tests. On the other hand, the small AWPI member companies are struggling to keep up with the nonfinancial requirements, and many of them seem to be succeeding. However, virtually none of the small companies can purchase insurance, and the option of meeting the financial test is not available to them. If this

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situation is not changed, the treated wood market will be left to large companies.

Clearly then it is in the public's interest from all sides to keep wood treaters in business who can meet their environmental responsibilities as well as earn enough to clean up from their past activites. To have such plants become a public liability because it is impossible, through no fault of their own, to meet a Government required financial test or to obtain insurance is not good public policy.

Mr. Chairman, in conclusion, we ask that Congress act quickly to avoid unintended problems in the wood-treating industry due to the unavailability of commercial liability insurance. My colleagues and I will be pleased to address questions you and the subcommittee members may have.

Mr. FLORIO. Thank you very much.

[The prepared statement of Mr. Smerko follows:]

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TESTIMONY

OF

ROBERT G. SNERKO

PRESIDENT

AMERICAN WOOD PRESERVERS INSTITUTE

Thank you Mr. Chairman for giving the American Wood Preservers Institute (AWPI) the opportunity to present its testimony before this Subcommittee. Our reason for being here today is twofold. First, we want to bring into focus all of the problems that the small business sector of our industry face as a result of the virtual disappearance of the environmental impairment liability insurance market. And second, we want to recommend that the Congress, the Environmental Protection Agency, insurance companies, and the impacted industries work together to find a solution to the problem of not being able to be in compliance because insurance is unavailable. We have several solutions to suggest.

Accompanying me today are Mr. Walter G. Talarek, General Counsel for the Institute, and Mr. James Morriss, Executive Vice President of the Texas Electric Cooperative, a member of AWPI. Mr. Talarek and Mr. Morriss are here to help address any questions you might have.

The American Wood Preservers Institute is a trade association comprised of 53 companies that pressure treat wood; 15 suppliers of the chemical wood-preservatives; and 22 entities related to the wood preserving business. While we represent only a relatively small fraction, 12%, of the 428 companies in the industry, our members account for around 35% of the total production of treated wood products.

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The wood treating industry is made up mostly of small businesses. In 1984, there were 428 companies operating 544 plants. These plants produced approximately 500 million cubic feet of treated wood products. Approximately 129 million cubic feet, or 26% of total production, was pressure-treated by the 10 largest producer companies.

The major applications of the products produced by the industry included: railroad ties, electric and telephone utility poles; outdoor landscaping projects such as decks, fences and retaining walls; buildings with important structural parts subject to decay or insect infestation; docks and marinas; highway bridges and guardrails; greenhouses and agricultural stakes; foundation and marine pilings; laminated beams; and permanent wood foundations.

Wood treating is one of the industries in the United States most severely impacted by environmental regulations. This situation is the result of a combination of factors. The process of preserving wood requires the use of chemicals that produce waste listed by EPA as hazardous, and the process produces large quantities of wastewater. In addition, our industry is an old industry with some plants dating from the turn of the century or earlier. The practices used in the past for managing the waste and the wastewater, while in keeping with the environmental thinking and requirements of those times, were

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clearly not up to today's environmental standards. Thus, past practices plus an existing higher standard of environmental protection add up to the need for substantial corrective actions, monitoring, and changes in the ways wastes are handled at many wood treating plants.

The wood treating companies represented by AWPI fully realize their environmental responsibilities and are working to meet them. Our member companies are committed to cleaning-up waste from past operations which, in some cases, has been generated over the past 50 to 100 years; and they are committed to operating their plants acccording to today's standards.

Furthermore, we have absolutely no quarrel with the policy that Congress set in 1976 to assure that the cost of compensating any injury to human health or damage to the environment caused by the escape of hazardous waste would be borne by the responsible party. Our difficulties lie in the current implementation and administration of this policy now that the environmental impairment liability insurance market has all but disappeared. We can only surmise that when Congress passed the Solid Waste Disposal Act in 1976, it surely must have expected that small companies would have available to them the means to comply with the regulations that implemented the policy.

I am here today to ask for your assistance in resolving two immediate problems affecting the wood preserving industry

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that are due to the general unavailability of environmental liability insurance. First, Section 3005(e)(2) of the Resource Conservation and Recovery Act (RCRA) requires that interim status land disposal facilities certify compliance with all applicable financial responsibility requirements by November 8, 1985, or lose interim status. Thus, facilities that are in compliance with all other RCRA requirements, but that have failed to obtain liability insurance coverage, will lose interim status and will have to shut down their land disposal units. In turn, this action could lead to the shut-down of these facilities.

Second, because many other types of permitted and interim status treatment, storage, and disposal (TSD) facilities are unable to obtain, or are about to lose, liability insurance coverage, they will be subject to EPA enforcement action. This could lead to loss of their interim status or permits, and also could result in the imposition of civil and criminal penalties.

Although the November 8th deadline adversely impacts an apparently small number of wood treaters -- we have identified six through a non-scientific survey of about 60 treaters -- it presents a problem that must be resolved. The deadline also serves to focus attention on the larger, potentially more serious problem caused by the general unavailability of liability insurance to small businesses that treat, store, or dispose of hazardous waste. These facilities will be unable to meet EPA's liability requirements at 40 CFR 264.147 and 265.147.

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It can be argued that some wood treaters presently do not have TSD units, and that wood treaters can take action to eliminate their present TSD units while not having to cease operations for a lengthy period of time. These arguments may be true in some situations, depending on individual circumstances, type of treatment system or preservative used, and availability of viable disposal or treatment options. The point is, however, EPA presently has in progress a rulemaking that will eventually capture virtually all wood preserving facilities in the RCRA hazardous waste management system. Every plant could become a TSD operation. When this occurs, absent the availability of insurance or viable alternatives to insurance, many wood treaters might have to cease operations for failure to be in compliance with EPA's liability requirements, as they exist today.

The insurance problem has become so severe in the wood treating industry that even facilities that have TSD units that present minimal risks to human health and the environment cannot either obtain or retain the required coverage at reasonable rates. For example, one wood treating company in the southeast that has a permitted container storage area, now has only one-half the required coverage for sudden accidental occurrences. Moreover, the company has been notified by its carrier that it will lose all of its coverage when its policy comes up for renewal in September, 1986.

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Another example is the wood treating company in the northwest with a permitted above-ground tank storage unit that presently pays $100,000 per year for coverage for sudden accidental occurrences. This company has been notified by its carrier that in order to retain this insurance beyond the renewal date of March, 1986, it must have a $15,000 engineering study conducted by a firm named by the insurance company. Furthermore, the premium for the policy for the renewal period will be between 50% and 225% greater than the present premium.

Still another major problem, linked to the unavailability of insurance, may have to be faced by wood treaters. Section 3004(u) of RCRA requires permits issued under Section 3005 to contain assurances of financial responsibility for completing corrective action where there is a release at a facility. We believe that many wood preserving facilities could have releases at the time of permit application. Thus, unless alternatives to insurance are available for demonstrating financial responsibility, or a waiver mechanism is provided, many facilities might not be able to comply with this statutory requirement.

We would hope that Congress and EPA will quickly avert these impending problems for the wood preserving industry caused by the unavailability of insurance. We believe that Congress, EPA, and the involved industries should begin to explore in a

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cooperative manner, potential remedies. First and foremost, we support H.R. 3692 and we hope Congress acts quickly to enact it as this bill provides immediate relief from the November 8th problem. In addition, we have some bare-bones suggestions to make. While there may be little new in what we are presenting here, we would hope the following items merit the careful analysis by the Congress, EPA, and others:

1. Congress can authorize and direct EPA to provide viable alternatives to the existing liability requirements. These alternatives might include: (a) small business financial test; (b) risk retention groups, pools, and captive insurance groups; (c) good faith waivers; and (d) government-run uninsured facilities fund.

2. EPA can act under its existing authority to address the problem. EPA can: (a) authorize other financial mechanisms, such as trust funds, guarantees, surety bonds, and letters of credit; (b) authorize a small business financial test; (c) reduce the tangible net worth and financial ratios in the existing financial test; (d) lower the required levels of coverage in the existing regulations based on the type of TSD unit and the risk it presents to human health and the environment; (e) grant good faith waivers where insurance is

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unavailable; (f) allow deductibles instead of first dollar coverage; (g) allow defense costs to be included in coverage; and (h) provide for a corporate guarantee.

The very large environmental debt carried by most companies in the wood treating industry can be satisifed given the time and resources. This is certainly true for the wood treating operations of large companies. It can also be true for most of the small companies, but not all of them.

In general, the large companies in the AWPI membership have been moving quickly to clean-up and to get on with running their business. They are in a position to meet all requirements, including the financial tests. On the other hand, the small AWPI member companies are struggling to keep up with the non-financial requirements, and many of them seem to be succeeding. However, virtually none of the small companies can purchase insurance, and the option of meeting the financial test is not available to them. If commercial liability insurance or alternatives are unavailable to small wood treaters, the treated wood market will be left to large companies.

Clearly then, it is in the public's interest, from all sides, to keep wood treaters in business who can meet their environmental responsibilities as well as earn enough to clean-up from their past activities. To have such plants become a public liability because it is impossible, though no fault of their own, to meet a government required financial test or to obtain insurance, is not good public policy.

Mr. Chairman, in conclusion, we ask that Congress act quickly to avoid unintended problems in the wood treating industry due to the unavailability of commercial liability insurance. My colleagues and I will be pleased to address questions you and the Subcommittee members may have.

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Mr. FLORIO. Mr. Fortuna.

STATEMENT OF RICHARD C. FORTUNA

Mr. FORTUNA. Thank you, Mr. Chairman.

I am Richard Fortuna, executive director of the Hazardous Waste Treatment Council. We are the largest trade association of commercial hazardous waste treatment and management firms which played a large role in the enactment of RCRA, and we are in strong support of the November 8 deadline provision.

I think it is important to frame the issue correctly. As we see it there are basically two.

One is: are there any unintended victims or casualties of the November 8 deadline that we didn't anticipate in November 1984, and what relief if any, should the committee afford to these facilities? The question at hand is really not so much as to whether we are putting people out of business.

I think it is important to focus on the fact we are talking about putting land disposal units at these facilities out of business. The statute does not affect the other commerce of the facility.

I would like to review a couple of facts not yet brought out in previous testimony. The November 8 deadline is, as we see it, the first of a series of true watershed development in the implementation of the 1984 RCRA amendment.

But I think it is important to keep in mind that this is only the first of such. We have the impoundment retrofitting deadlines coming up in November 1986, the land disposal deadlines coming up, small generators coming up in March 1986, so this is only the first of many.

My real concern is with the way in which the issue is being approached aside from whether or not we have a legitimately agreed body of facilities, is that if this committee begins to give a signal that the closure of a handful of facilities provides enough impetus to reopen the statute it will give a signal that other deadlines are fair game, too, and people will put effort not into trying to comply, but in trying to get further legislative amendment.

It is important to note that we don't come to this with a free hand, if you will. Several of our members have been adversely affected by the November 8 deadline as well, adversely affected in the sense that they are doing what the bill intended but have either closed impoundments, found alternative forms of insurance, done what they had to do to comply.

The bottom line is the members of the Treatment Council do not want to become the environmental equivalent of Chrysler Corp. and the cafe standards, that we put our effort and resources in complying, only to have something overturned at a later date when a larger body of facilities or firms could not.

Several members have lost insurance as a result of the general departure of their insurers from the marketplace. All these firms have subsequently found coverage, have several insured or have closed those units that would have been subject to loss of interim status.

I think it is important to note that while the insurance market is tight, it is not nonexistence.

The American National Group of Storewriting Policies, and a new insurance company has entered the market, the high percept insurance pool which is geared to provide RCRA coverage for "small- and medium-sized companies" which cannot afford to self-insure.

It is important to note though that they have very stringent qualifications for their insurance pool which turn on annual audits and very rigorous loss-prevention programs.

But this is as it should be, and this is how—this is what it was intended to be where the insurere actively complemented the enforcement activities of EPA. I think it is ironic that we have members today of the wood preserving industry who decided to challenge in court last Friday the validity of the insured status provision and the financial responsibility requirements in toto at a time when several of these firms are approaching our members to come under their sites to conduct remedial actions to remove and clean up some of those creosote pits.

But again this is what was intended. We intended for firms to have to change their behavior and modify their previous activities and to engage in expenditures and activities that they otherwise would not have done.

In conclusion, I note that first and foremost we see the issue as a referendum on the seriousness of this committee's implementation of the 1984 RCRA amendments. If essentially after the fact ploys by a relative handful of firms which cannot or will not modify their practices to comply with long established environmental requirements provides a sufficient basis to reopen the statute, even when closures were clearly anticipated, then every subsequent deadline prohibition or requirement is going to become fair game as well.

At the same time I think it is worth noting that there probably is a very small number of facilities that have legitimate complaints about the way in which the loss of interim status provision has affected them, but I think this group consists of only those firms that meet four specific requirements and those are:

One, that they have lost insurance as a result of the departure of their insurer from the general environmental marketplace, and that is an important distinction.

That is not to say firms who have been selectively canceled by their insurer would qualify but where an insurer is leaving the environmental marketplace.

The second criteria is that they are too small to self-insure.

The third is that they are in compliance with ground water monitoring requirements.

And fourth, they have made consistent efforts to find other coverage.

The issue then becomes, Mr. Chairman, what do we do for those people who qualify under those four criteria, what is the method of relief. And we would strongly oppose and under no circumstances support any legislative redress even for this group of facilities for two specific reasons.

I think the foregoing discussion that the committee had here with the EPA panel in and of itself is reason why a legislative amendment at this time is bad news. Even with the best of inten-

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tions we have very significant ambiguities as to whether ground water monitoring is involved or not, whether pemanent deadline extensions are involved or not.

With the small generator thing coming up in March this is not going to happen very quickly. We are invariably going to turn this thing into a cornucopia of potential concessions to firms that are just otherwise not interested in complying.

Everybody is going to have somebody in their district that is going to hurt a little bit from something or another, be it a small generator or wood preserver, and we will be opening up the statute to a Christmas tree potential session at a time when we are beginning to turn the corner to putting the protective measures in place.

We disagree with EPA that there is no way to administer or institute an administrative solution. What we propose doing, and I seriously recommend that the committee pursue with EPA, is the following limited administrative remedy. It would have to be a two-fold simultaneous program whereby the agency would issue what are called interim status compliance letters to facilities that fall within this catetory I have described.

This device was used by the agency in 1980 when Congress first established interim status for facilities that were intially denied interim status or failed to qualify subject to no fault of their own. Simultaneous with that action with essentially identifying this limited group of aggrieved facilities, the agency should then promulgate an interim final rule pursuant to its August activity which would essentially establish a good-faith period, if you will, for this group of facilities for a 6- or 8-, 10-, 12-month period for them to try to find the requisite coverage that they would need to come into compliance.

But again only for these people that meet these limited criteria, people that have been canceled as a result of a general departure of their insurance from the marketplace, too small to self-insure, they have made good faith efforts and are in compliance with ground water monitoring.

I would like to turn the panel discussion over to Ridgway Hall, our general counsel for a couple of minutes who would like to embellish a couple of points on the interim status corrective actions letter.

Mr. FLORIO. Brief comments.

Mr. HALL. For the record, Mr. Chairman, and members of the subcommittee, I am Ridgway Hall, a partner in the firm of Crowell & Moring; and a general counsel of the Treatment Council. Several of you asked during the EPA discussion whether EPA had the authority to solve this problem administratively before the November 8 deadline.

The answer is that they did and they proposed on August 21, 1985, several options in the Federal Register which would have done that, including an exemption based on good-faith treatment to get insurance a waiver of some time. In fact, this spring, Mr. Lucero issued an enforcement policy memo dealing with interim status compliance with insurance requirements given the constrained insurance market and he allowed good-faith waivers which were picked up by the State programs as well, and that was run during the interim status period prior to November 8.

Unfortunately, EPA chose not to promulgate any of those administrative solutions which would have included a good-faith waiver prior to the November 8 deadline, so now having lost the deadline the problem now becomes more difficult.

What do you do now that some facilities have lost it?

The solution which the Treatment Council recommends which as Mr. Fortuna said would not solve legislation would solve EPA's promulgating one or a combination of the options which they proposed on August 21. We recommend the good-faith waiver for a limited period of time. It might also include things like allowing the corporate guarantee which would broaden the options of solutions from some companies as well.

Mr. FLORIO. There is a substantial difference though between a good-faith waiver and alternative ways of complying. You heard Mr. Lucero say the Justice Department won't give them support for somehow coming forward administratively with a waiver of the clear intent of the law.

That is to be contrasted with what I think is an universal agreement that they can in the administrative process change the definition of financial security. So you do concede, I assume, that those are two substantially different approaches, one that appears not to have Justice Department support in defining the authority under RCRA to provide for waivers of the clear statement of the law.

Mr. HALL. I think that is an important decision. I have discussed with the EPA general counsel's office and with the Justice Department whether it was their view that EPA had the authority to promulgate any of the options that they did propose on August 21 and the answer was question administration I agree with that analysis.

I think it is important to note that it was EPA that put the liability insurance requirements into the financial responsibility regulations and EPA then would have the authority to modify its own regulations to define what shall be deemed in compliance with those regulations.

Mr. FLORIO. But a waiver is substantially different than redefining what is compliance with financial responsibility.

Mr. RITTER. Mr. Chairman, if you might yield, here is a situation where EPA, because it misses deadlines, gets hit upon by the Congress and a whole litany of political organizations. I suspect, and I have information to this regard, that EPA did test the waters, and that the waters were not friendly to such a waiver. Then, we set EPA up so many times, we set them up with certain kinds of rules, regulations, and deadlines, and then when they don't make it we clobber them.

So, here is a situation where EPA is wary about changing the venue, and now we are clobbering them.

Mr. FLORIO. Would the gentleman yield?

Just to make it very clear—the idea of a waiver—I agree with the Justice Department—is clearly unauthorized under the law. You don't pass the law and then give the administrative agency the ability to waive the law. The ability to redefine compliance through regulatory process, which itself is responsible, is something substantially different.

I agree with the gentleman that it is inappropriate for anyone to now be critical of EPA because they didn't, through the adminis-

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trative process, waive the law. I am not being critical of EPA in that regard.

Mr. HALL. Very quickly, the administrative record was mixed on that point. There were a number of people who supported some kind of relief valve, and what we propose is have EPA promulgate in the Register a regulation which would say if you can demonstrate according to four criteria, which Mr. Fortuna outlined, good-faith efforts to get insurance, and that is the only thing which kept you out of interim status and you have made reasonable efforts to get it, you must certify to those efforts, and if they meet our standards we will treat you as though you had interim status and issue what is called an interim status compliance letter, which the agency did in the past for people who, through excusable neglect didn't meet interim status back in 1980.

And the agency did that once before in the 1977 Clean Water Act BPT deadline. It has the authority to do that and we recommend it.

[Mr. Fortuna's prepared statement follows:]

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TESTIMONY

RICHARD C. FORTUNA

EXECUTIVE DIRECTOR

HAZARDOUS WASTE TREATMENT COUNCIL

Mr. Chairman, Mr. Lent, Members of the Subcommittee, my name is Richard C. Fortuna. I am Executive Director of the Hazardous Waste Treatment Council. I appreciate the opportunity to testify this morning on the insurance apsects of RCRA's loss of interim status provision, which took effect on November 8, 1985.

BACKGROUND ON THE HWTC

The Hazardous Waste Treatment Council (HWTC) is a national association of commercial firms that share a common commitment to the primary use of treatment and recycling technology in the management of hazardous wastes, and to the restricted use of land disposal. The Council is the largest organization representing the interests of commercial hazardous waste treatment and management firms. Our 40 member companies operate facilities in 48 states and represent the full spectrum of established and emerging treatment technologies and management methods including incineration and other forms of thermal destruction, reclamation, biological and chemical treatment, fixation, activated carbon treatment, land disposal after proper pretreatment, and remedial site investigation and cleanup.

The Treatment Council was the lead industry group in support of the 1984 amendments to the Resource Conservation and Recovery Act (RCRA). We believe that these amendments put this nation at long last on the road to establishing a hazardous waste regulatory program that truly prevents the creation of additional "Superfund" or problem sites. This will be accomplished through a combination of restrictions and minimum technology requirements on land disposal, and the closing of numerous legal regulatory loopholes that have allowed the "legal dumping" of hazardous wastes for many years.

SUMMARY OF ISSUE

Are there any unintended casualties of the November 8 deadline, or is this simply the scheduled elimination of marginal and uninsurable disposal units as was clearly expected under the RCRA 1984 Amendments? What relief, if any, should the Committee and the Congress grant to less than 50 waste disposal units that apparently have lost have lost interim status solely due to non-compliance with the interim status financial responsibility requirements?

The question at hand is <u>not</u> whether <u>businesses</u> are going to be closed. <u>Rather</u>, the issue is whether <u>out-of-compliance</u> hazardous waste <u>land disposal units</u>, largely comprised of waste pits and lagoons, are going to be "put out of business."

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DISCUSSION

The November 8 termination of interim status provision is an important and integral part of the nation's transition to a protective hazardous waste management system. It is a watershed event, but only the first of many. In the upcoming months and years several other significant deadlines will be encountered including the general phase-out of surface impoundment disposal, and the land disposal prohibitions themselves.

It is the Treatment Council's view that the manner in which the Committee and the Congress respond to the loss of interim status (LOIS) issue will have a greater impact on the the proper implementation of these future prohibitions than it will on the relative handful of facilities affected by LOIS. If a signal is given that the closure of 50 land disposal units can cause the statute to be reopened, then the Committee should be prepared to make the RCRA reauthorization a weekly agenda item.

The following is a summary of salient facts and the Treatment Council's findings regarding the insurance aspects of the LOIS provision:

* EPA first established liability insurance requirements for RCRA hazardous waste facilities in January, 1981. Smaller facilities with land disposal units (revenues of less than $5 million annual sales) were given until January 16, 1985 to demonstrate insurance coverage for non-sudden occurrences. All treatment, storage and disposal facilities were required to demonstrate insurance coverage for sudden or accidental occurrences by July 15, 1982;

* According to the most recent Agency data only 50 of the approximatley 1500 land disposal units subject to the November 8 deadline will lose interim status solely because they have no liability insurance;

* The statute and legislative history clearly contemplated that several land disposal facilities and/or units would lose interim status and be forced to close. These units were viewed as self-selected problem sites, literally waiting to be closed when their permit was called, due to their failure to comply with monitoring and/or financial responsibility requirements that were four years old;

* Several Treatment Council members have had to institute modifications to their operations (impoundment closure, tank installation, etc) or procure alternative insurance coverage in order to comply with the LOIS certification requirements or to render it inapplicable to their facilities;

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* several Members have lost their insurance coverage due to the departure of their insurer from the environmental marketplace. All have subsequently found other coverage, self-insured, or closed those units subject to the LOIS provisions;

* The Treatment Council's recent survey of the environmental insurance market reveals that RCRA sudden and non-sudden coverage is difficult, but not impossible to find. The American International Group is still writing policies. Several captive insurance arrangements are nearing fruition, although they are awaiting the passage of "Superfund" and its new environmental pollution risk retention group authority;

* A new insurance company has just entered the market, the HYPERCEPT Insurance Pool, based in Pequannock, N.J, which is seeking to provide RCRA insurance coverage to "small to medium sized companies which cannot afford to self-insure." However, their literature clearly states that, "Membership is contingent upon applicants meeting HYPERCEPT standards based upon annual risk assessments and continuous risk management of all environmental exposures. The aggressive loss prevention and control program is an absolute necessity for revitalization of enviornmental liability coverage in the extremely tight commercial insurance market existing today." This is as it should be and should have been, where the insurer actively supplements Agency enforcement through independent audits and preventive risk management programs;

* The site of a facility having difficulty complying with new environmental regulations is not pleasant, but then neither is the specter of an uninsured, leaking disposal pit operating with impunity for nearly four years. In the final analysis it was the clear concern for health and environment that brought this provision into existence, and not the desire to ensure that everyone could comply without modifying their facility or incurring additional cost;

* It is ironic that the members of the wood preserving industry have decided to challenge this requirement at a time when several firms within the Treatment Council are receiving inquiries for the first time from facilities that want to close and remediate their on-site creosote pits. Again, this is how we envisioned that the system would and should work---long neglected facilities finally undertaking the necessary corrective actions and on-site modifications;

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* The Benton Creosoting Emergency Motion for Suspension of the financial responsibility requirements stated that they will be forced to "cease business operations" due to the LOIS provision. However, their brief fails to address the issue of how the closure of its diposal pits put the production facility "out of business." The loss of interim status for disposal units has no effect on other business operations as a matter of law. In addition, as the Justice Department's response to the emergency motion states, "...if any compelling practical reasons exist why petitioners cannot make other arrangements for their hazardous wastes, the affidavits now before this Court fail to disclose them." Clearly, if this situation existed, the emergency motion would have been the most appropriate vehicle for such disclosure. In addition, all hazardous waste generators are allowed 90 days of on-site storage before having to apply for a storage permit.

CONCLUSION

First and foremost, the issue under consideration today is a referendum on our resolve to implement the RCRA Amendments in a timely and proper manner.

If after-the-fact pleas by a relative handful of firms, which cannot or will not modify their practices to comply with long established requirements, provides a sufficient basis to reopen this statute even when closures were clearly expected, then every subsequent deadline, prohibition, and restriction will become fair game as well.

We have a hazardous waste law that finally means business. One which is accomplishing precisely what it set out to do; phase out certain land dipsoal facilities and practices, and provide certainty for the transition to and investment in permanent and protective technologies. It isn't going to take much equivocation to upset this deliberate but delicate transition. Depending on the Committee's action firms may well decide to put their efforts and resources into lobbying for legislative changes, rather technologies or facilities that prevent repetition of past mistakes.

At the same time there is a very small group of facilities that likely have legitimate complaints about their fate under the loss of interim status provision (LOIS). This group consists of those firms that meet all 4 of the following criteria: 1) have lost insurance coverage within the past 12 months due to the total departure of their insurer from the marketplace; 2) are too small to self-insure; 3) are in compliance with all applicable groundwater monitoring requirements; and 4) have made consistent efforts to find other coverage.

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The limited number of facilities that meet these 4 criteria should be accorded the limited relief described below.

RECOMMENDATIONS

Under no circumstances should the relief for these limited number of facilities involve legislation. Any legislation introduced on this issue is highly susceptible to becoming a cornucopia of concessions to non-complying facilities.

Rather, facilities that meet the 4 criteria specified above should be accorded a limited administrative remedy. EPA's previous suggestion of using compliance schedules for such a limited universe would have been appropriate prior to the November 8 deadline, but now appears to be unavailable. The relief for such facilities now requires two separate but simultaneous actions:

* first, the Agency would have to issue Interim Status Compliance Letters to facilities that fall into this category to reinstate interim status. This device was used by the Agency in 1980 when Congress first established interim status for facilities that were initially denied interim status, or which failed to notify due to a misunderstanding (November 19, 1980 FR 76630); and,

* second, the Agency should promulgate a response to its request for comments on financial responsibility requirements (August 21, 1985 FR 33902) in the form of an interim final rule that would authorize a 6 month waiver for firms that met the 4 criteria.

In addition, we would recommend that the Committee work with the Agency to first determine how many firms meet these criteria, and in turn whether any administrative action needs to be taken.

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Mr. FLORIO. Let me ask one question and then I will ask the other gentlemen if they have question, particularly to the gentleman from the wood preservers group.

The gentleman from Texas Electric Cooperative, it is my understanding that you provide telephone pole services to various utilities?

Mr. MORRISS. Utility poles.

Mr. FLORIO. The suggestion has been made that in your instance if there was expanded authority on the regulatory system, those people that you service might be authorized under an expanded administrative definition of financial security to come to a cooperative agreement, a cooperative indemnification agreement to keep you in business, to hold you harmless for the liability that may occur in the event of some difficulty.

Is that something that you have explored in terms of an alternative in the event that EPA were to redefine administratively what constitutes financial security?

Mr. MORRISS. We have not explored it because it is a brand new idea.

Mr. FLORIO. Not brand new in the sense that there has been discussion about alternatives, corporate indemnification situations, third-party contracts. I was hopeful that we could have gotten some sense from EPA that they are going to be attempting to deal with those types of things, and we have not gotten that yet.

With regard to the insurance concerns, Mr. Smerko, is it my understanding that you are not optimistic about insurance options at all for some of your smaller companies?

Mr. SMERKO. Well, at the present time, no; not very optimistic at all.

Mr. FLORIO. I trust that you don't walk away from the concept of financial responsibility, that there has to be some other form of financial responsibility so that if problems do emerge it is not the taxpayers that pay for it.

Mr. SMERKO. Absolutely.

Mr. FLORIO. So long as we are in agreement with that.

Mr. TALAREK. We agree and believe that EPA has many options available to it, however, that it has failed to implement them via regulation.

Mr. FLORIO. I think we are in agreement then.

Mr. Broyhill.

Mr. BROYHILL. Mr. Morriss, it is my understanding—you do the treating, is that correct?

Mr. MORRISS. Yes, sir.

Mr. BROYHILL. And you sell to other people; is that correct?

Mr. MORRISS. Only to electric cooperatives.

Mr. BROYHILL. It is my understanding in the meantime, while you are waiting on this bill, or waiting on this administrative relief, you are out of business?

Mr. MORRISS. We have found a way to stay in business. It is a Band-Aid, and it is a pretty limp Band-Aid, but we are fortunate to stay open because——

Mr. BROYHILL. But you have other members in this association. I thought you were one of the six that everyone is referring to.

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You are not one of the six that everyone is referring to that may be out of business——

Mr. MORRISS. We may be, if the Band-Aid doesn't hold.

Mr. TALAREK. The Band-Aid appears to be only available for the next 10 to 15 days. After that period of time they will be back to the situation they were in on November 8.

If they don't have their surface impoundment available they will have to shut down the facility.

Mr. BROYHILL. I am not talking about compliance. We are talking about the liability insurance.

Mr. TALAREK. It is also true that they will not have the liability insurance available at that time.

Mr. BROYHILL. What kind of liability insurance have you obtained for that 2-week period?

Mr. MORRISS. We have none at the moment.

Mr. BROYHILL. Then you are going to be out of business?

Mr. MORRISS. Yes; when our Band-Aid wears out.

Mr. BROYHILL. I don't understand. We are not talking about compliance with the ground water regulations, sir; so let's forget about those.

We are talking about the liability insurance. What have you done to obtain liability insurance and what answer have you got?

Mr. MORRISS. We have had insurance since 1982 both sudden, accidential, and then, as required, nonsudden, and nonaccidental. We were notified in January of this year that when our renewal date, March 3, 1985, came up, our insurance would not be renewed, so we are a classic example of one who had it, qualified, and lost it because our insurer withdrew from the market by their own statement.

Mr. BROYHILL. Are you staying in business because of a court order?

Mr. MORRISS. No. Until November 8, we have been operating legally under interim status.

Mr. BROYHILL. What are you talking about on the Band-Aid——

Mr. MORRISS. Let me be specific. Come notification or the realization and that is very important as far as we are concerned, the realization, that in fact, the November 8 deadline and all its ramifications would be imposed in spite of the fact that the insurance market had entirely disappeared from our information—it is not for sale to us, because we have looked everywhere to buy it, and before the sunset on Friday, November 8, we quit disposing of process waste water into our surface impoundment.

We put it into a tank. But that is going to fill up. We replumbed the plant in about 48 hours, and diverted the water into it. That is the Band-Aid.

Mr. BROYHILL. But you still have no liability insurance?

Mr. MORRISS. No; and have made every effort to find it. We are one of that small universe that meets all criteria except we cannot buy liability insurance.

Mr. BROYHILL. Ms. Greer, why would you want to put these people out of business?

Ms. GREER. I am not asking to put them out of business. I am asking them to keep the waste water out of the lagoon and keep it in tanks.

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That is something that a number of facilities that had a November 8 compliance problem did and that is something that we regard as a positive response.

Mr. BROYHILL. If they can't find liability——

Ms. GREER. They don't need the same kind of liability insurance if they use tanks as if they have impoundments because impoundments require considerably more insurance than a tank as a treatment and storage facility. We have information that this facility has already contaminated the ground water, and so it is possible that that is one of the reasons why they are having a difficult time getting insurance as a disposal facility. They have a positive alternative to closing their business, which is to use a treatment tank.

Mr. BROYHILL. If they are out of business they don't have the wherewithal to be there to do something about cleaning up that ground water.

Ms. GREER. They are not out of business. They are out of their lagoon.

As of today they have done the correct thing and need to continue to keep their waste in a tank.

Mr. BROYHILL. They still have lagoons there?

Mr. MORRISS. Yes. And plan to close them. We are going to close them, and under Texas enforcement the water resources department have been partially under the misapprehension, and that came 2 weeks ago, there was a misapprehension that we submitted part B, and a closure plan in February of this year.

Mr. BROYHILL. I am saying why would you oppose a bill that would help keep them in business, let them continue operating so that they can have the revenues and the wherewithal to do what is the right thing——

Mr. MORRISS. And do everything she says——

Mr. BROYHILL. But you are, in effect, saying you don't want them to be in business?

Ms. GREER. I have not said that I don't want them to be in business. I have said that I don't want their waste water in their lagoon. That is a separate statement. There is a third alternative to either staying in business or going out of business. The alternative is to stay in business and put their waste water in treatment tanks, which is, in fact, what they have done in their Band-Aid.

Mr. BROYHILL. He just testified that he can't get any liability insurance?

Ms. GREER. He cannot get liability insurance for his lagoon. It is a $3 to $6 million insurance requirement for a lagoon, whereas it is a $1 to $2 million insurance requirement for a tank.

He has not testified that he has tried and not been able to receive liability insurance for his tank. We have examples of people who have successfully undertaken desirable changes for November 8 and remain in business.

Mr. BROYHILL. Would you answer that?

You are still going to have the lagoons there for——

Mr. MORRISS. They have been there since 1972, and we plan to close them as rapidly as possible.

Mr. BROYHILL. But it will take quite a while and you are not able to get liability insurance on that?

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Mr. MORRISS. That is the insurance we lost.

Mr. BROYHILL. If you can't get liability insurance on that are you not out of business?

Mr. MORRISS. Theoretically, we are.

Mr. BROYHILL. That is where I think you haven't answered, ma'am, is that he is out of business, he has to close down.

Ms. GREER. He is in business today, is he not?

Mr. BROYHILL. He is not in business——

Ms. GREER. He is in business today and he is in business today because he is in a tank instead of his lagoon.

Mr. TALAREK. The tank is only good for 2 weeks, then he is out of business.

Mr. FLORIO. The committee will come to order.

The witnesses are to address members of the committee.

Does the gentleman from Pennsylvania have a question?

We have approximately 4 minutes to vote and we have to vacate the room by 12:30, unfortunately.

I express my appreciation to this panel——

Mr. RITTER. You mean you are not coming back?

Mr. FLORIO. We have to vacate the room by 12:30.

Mr. RITTER. I guess I would like to make one statement.

The idea of closure because of ground water contamination needs some examination. What the contamination is and how much the contamination is bears on the decision of closure.

We can detect anything out there. If it is one part per billion of something that is risk assessed to be nonhazardous compared to whatever is in the water at the present time, that is something that has to be taken into account.

The mere presence of some foreign substance in ground water is not—is not the basis for a closure decision, the sole basis.

Mr. FLORIO. I thank the gentleman for his remarks and the committee stands adjourned.

[Whereupon, at 12:23 p.m., the hearing adjourned.]

[The following letters were submitted for the record:]

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BROWN MARONEY ROSE BARBER & DYE
ATTORNEYS AND COUNSELORS

1800 ONE REPUBLIC PLAZA
333 GUADALUPE
AUSTIN, TEXAS 78701
(512) 472-5456

November 12, 1985

WRITER'S DIRECT NUMBER:

(512) 479-9784

Congressman Jim Broyhill
Energy & Commerce Committee
Subcommittee on Commerce,
Transportation & Tourism
House Annex 2, Room 564
Washington, D.C. 20515

Via Federal Express

Re: November 13, 1985 Hearing on the Effect of the November 8, 1985 Interim Status Deadline

Dear Congressman Broyhill:

This firm represents Border Steel Mills, Inc. ("Border Steel") which presently operates a ferrous metals facility in El Paso, Texas. Border Steel is a steel "mini-mill" that is, a breed of steel mill which fills a specialized niche in the steel-making industry, formerly inaccessible to large steelmakers. Border Steel's involvement in hazardous waste management resulted from air controls originally mandated by the Clean Air Act. The mill uses as a raw material scrap steel which often contains lead, cadmium, and chromium, all of which have relatively low boiling points and are emitted from the steel melt, which occurs at temperatures above their boiling points. These metals condense as a fine dust and are caught by baghouse filters. Under present regulations, the baghouse dust is a listed hazardous waste (K061). Since the middle of the last decade, Border Steel has disposed of the air emission dust by placing it into an on-site interim status landfill which is adjacent of the baghouse. The landfill has consisted of a series of rather narrow, but large, trenches that have been opened as needed and filled with the air emission dust from the baghouse.

Properly disposed of in a landfill, the only danger the air emission dust presents to the environment is the possibility

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that rainwater will carry hazardous constituents over 100 feet down to the water table. Because El Paso is so dry, there is a negligible probability that such an event could occur. However, despite the depressed nature of the steel industry, Border Steel has spent approximately $120,000 this year and is committed to spend over $500,000 to comply with hazardous waste laws regulating the use and operation of its landfill. This expense includes the installation of a liner system beneath its hazardous waste landfill used to dispose of the air emission dust. Additionally, Border Steel has augmented its groundwater monitoring system to further assure the water table has not and will not become contaminated.

Border Steel filed Part A permit applications in 1980 as required by State and federal law. A Part B permit application taking into account the November, 1984 Hazardous and Solid Waste Amendments ("Amendments") to the Resource Conservation and Recovery Act ("RCRA") was filed on October 1, 1985. Presently, the facility is in compliance with all applicable groundwater monitoring requirements and financial assurance requirements except the Environment Impairment Liability ("EIL") insurance coverage requirement.

Despite its continuing efforts to obtain EIL coverage, Border Steel has been unable to find an insurer willing to underwrite the risk associated with the operation of its interim status landfill. As a result, Border Steel understands that its facility's interim status terminated on November 8, 1985, despite the commitment of these significant sums of money and the fact that all other requirements of the Amendments have been satisfied, including certification with the groundwater monitoring and financial requirements (except for the EIL coverage).

The loss of this facility will have significant adverse economic impact upon Border Steel which is in a precarious financial situation primarily due to a severe industry downturn. Until this issue is resolved by the Environmental Protection Agency, Congress or the Courts, Border Steel must cease the use of its on-site landfill and utilize the expensive option of 90 day on-site storage and off-site disposal. This alternative more than doubles the disposal cost of the air emission dust. This situation jeopardizes the jobs of nearly 500 people and the economic health of El Paso.

Border Steel supports the passage of House Bill 3692 which would amend RCRA to provide that companies which have filled Part B permit applications and met the technical and financial requirements of RCRA could continue in operation if they can demonstrate a good faith effect at obtaining EIL.

Very truly yours,

Border Steel Mills, Inc.

by: John W. Teets
John W. Teets
Brown, Maroney, Rose, Barber, & Dye

JWT/jn/1960Y

cc: Mr. Forrest B. Boyd, Vice President
Administration & Finance
Border Steel
P.O. Box 12843
El Paso, Texas 79912

Jan Edlestein, Esq.
House Minority Counsel's Office
House Annex 2, Room 564
Washington, D.C. 20515

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436 Seventh Avenue, Pittsburgh, PA 15219
Telephone 412-227-2000

Personal & Private

KOPPERS

November 6, 1985

The Honorable James Broyhill
U. S. House of Representatives
Washington, D.C. 20515

Dear Congressman Broyhill:

Confirming my conversation with your office, I am writing to request your support in providing immediate relief from the Resource Conservation and Recovery Act (RCRA) requirements for interim status land disposal facilities to have sudden and non-sudden liability insurance by November 8, 1985.

Sudden and non-sudden liability insurance is not generally available to interim status land disposal facilities or other treatment, storage and disposal (TSD) facilities in the wood treatment business. Because of this, many wood treating facilities will be unable to certify that they are in compliance with these requirements on November 8, 1985, as required by the Hazardous and Solid Waste Amendments of 1984. This means that these facilities will lose their interim status. In turn these facilities may have to shut down or continue to operate in violation of the law.

The wood treating industry has been recognized as providing an enormous amount of benefits to our society. I am confident that Congress did not intend to create a legal requirement that is impossible for wood treating facilities to meet and, thus, deprive society of these benefits.

Therefore, I urge Congress to amend the law to extend the compliance date and to authorize case-specific waivers of the liability coverage requirements where an owner or operator can demonstrate that he failed to obtain coverage despite a "good faith effort". This amendment would, in essence, codify EPA's existing waiver policy.

The above aproach would promote environmental protection by maintaining the general liability coverage requirements, allowing the insurance industry additional time to develop needed insurance policies, and allowing regulated facilities that genuinely attempt to comply with the regulations to continue operations.

In conclusion, since the November 8 deadline is rapidly approaching, I strongly urge you to take immediate action to rectify the inequitable situation created by the present law.

Sincerely,

J F Brennan

J. F. Brennan
Marketing Manager
Wood Treating Products

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Cascade Pole Company
P.O. Box 1496
Tacoma, Washington
98401

November 5, 1985

The Honorable James T. Broyhill
U. S. House of Representatives
Washington, D. C. 20515

Dear Congressman Broyhill:

I am writing to request your support in providing immediate relief from the Resource Conservation and Recovery Act (RCRA) requirements for interim status land disposal facilities to have sudden and non-sudden liability insurance by November 8, 1985.

Sudden and non-sudden liability insurance is not generally available to interim status land disposal facilities or other treatment, storage and disposal (TSD) facilities in the wood treatment business. Because of this, many wood treating facilities will be unable to certify that they are in compliance with these requirements on November 8, 1985, as required by the Hazardous and Solid Waste Amendments of 1984. This means that these facilities will lose their interim status. In turn these facilities may have to shut down or continue to operate in violation of the law.

The wood treating industry has been recognized as providing an enormous amount of benefits to our society. I am confident that Congress did not intend to create a legal requirement that is impossible for wood treating facilities to meet and, thus, deprive society of these benefits.

Therefore, I urge Congress to amend the law to authorize case-specific waivers of the liability coverage requirements where an owner or operator can demonstrate that he failed to obtain coverage despite a "good faith effort." This amendment would, in essence, codify EPA's existing waiver policy.

The above approach would promote environmental protection by maintaining the general liability coverage requirements, allowing the insurance industry additional time to develop needed insurance policies, and allowing regulated facilities that genuinely attempt to comply with the regulations to continue operations.

In conclusion, since the November 8 deadline is rapidly approaching, I strongly urge you to take immediate action to rectify the inequitable situation created by the present law.

Sincerely,

GARY L. MILLER
LUMBER FOREMAN
McFARLAND CASCADE Co.

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COLFAX CREOSOTING COMPANY
P. O. BOX 231
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Treated Forest Products

Area Code 318
Phone 442-2487

November 5, 1985

The Honorable James T. Broyhill
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Broyhill:

I am writing to request your support in providing immediate relief from the Resource Conservation and Recovery Act (RCRA) requirements for land disposal facilities to have sudden and non-sudden liability insurance.

Sudden and non-sudden liability insurance is not available to plants in the wood preserving industry at the present time. We have made repeated efforts to secure this insurance, but have failed in every case. This means that no one in our industry, and probably in several other industries also, will be able to certify on November 8, 1985 that we are in compliance with the law. Consequently, everyone will lose their interim status, and the plants then must either shut down or tr to continue to operate in violation of the law. I do not believe tha: Congress intended to create a legal requirement that is physically impossible for many treating plants to meet, and thus deprive society of the benefits of the treating industry.

I would like to urge Congress to amend the law to authorize a case by case waiver of the liability coverage required, where an owner or operator can demonstrate a "good faith effort" to acquire necessary coverage, but has been unsuccessful. This approach would promote environmental protection by maintaining the general liability coverage requirements, and would allow the insurance industry additional time to develop policies affording the required coverage.

Since the November deadline is now on us, I strongly urge you to take immediate action to rectify the inequitable situation created by the present law.

Very truly yours,

Clyde M. Norton
Vice President

CMN/jf

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November 7, 1985

Representative James T. Broyhill
House of Representatives
Washington, D. C. 20515

SUBJECT: EPA RCRA REQUIREMENTS
FOR TSD FACILITIES

Dear Representative Broyhill:

The pressure treated industry is unable to obtain sudden and non-sudden liability insurance that is required by EPA.

EPA claims that they have been given no flexibility by congress to grant wavers and will shut down all treating plants if they do not have this insurance. This is a much worse problem for small companies than it is the large national corporations.

EPA (and their state counter parts) send us hundreds of letters and threats each year. They have so many departments and each one seems to try to be more severe than the other.

No one has any idea of how much anxiety, worry and expense it is causing treating plants but it has been severe.

Several times this year the monthly expenses incurred for EPA has been as great as that of the total sales volume at both of our plants (this does not include any clean-up work but just for testing, analysis and attorneys fee to try to determine what is required next).

We need relief before all of the small treating plants are forced out of business.

Sincerely yours,

Hugh Thomasson

P. O. DRAWER 490 PHILADELPHIA, MISSISSIPPI 39350..... PHONE (601) 656-6000

THOMASSON LUMBER COMPANY

Specializing In Treated And Untreated Southern Pine

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Selma
Treating
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Old Hiway 99 and Dockery Avenue, P.O. Box 89, Selma, California 93662/Phone (209) 896-1234

The Honorable James T. Broyhill
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman:

I am writing to request your support in providing immediate relief from the Resource Conservation and Recovery Act (RCRA) requirements for interim status land disposal facilities to have sudden and non-sudden liability insurance by November 8, 1985.

Sudden and non-sudden liability insurance is not generally available to interim status land disposal facilities or other treatment, storage and disposal (TSD) facilities in the wood treatment business. Because of this, many wood treating facilities will be unable to certify that they are in compliance with these requirements on November 8, 1985, as required by the Hazardous and Solid Waste Amendments of 1984. This means that these facilities will lose their interim status. In turn these facilities may have to shut down or continue to operate in violation of the law.

The wood treating industry has been recognized as providing an enormous amount of benefits to our society. I am confident that Congress did not intend to create a legal requirement that is impossible for wood treating facilities to meet and, thus, deprive society of these benefits.

Therefore, I urge Congress to amend the law to authorize case-specific waivers of the liability coverage requirements where an owner or operator can demonstrate that he failed to obtain coverage despite a "good faith effort." This amendment would, in essence, codify EPA's existing waiver policy.

The above approach would promote environmental protection by maintaining the general liability coverage requirements, allowing the insurance industry additional time to develop needed insurance policies, and allowing regulated facilities that genuinely attempt to comply with the regulations to continue operations.

In conclusion, since the November 8 deadline is rapidly approaching, I strongly urge you to take immediate action to rectify the inequitable situation created by the present law.

Sincerely,

Bill Lawton

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INTERNATIONAL PAPER COMPANY
POST OFFICE BOX 1000, JOPLIN, MISSOURI 64801, PHONE 417 624-0670

TREATED WOOD PRODUCTS DIVISION

November 5, 1985

Representative Jim Broyhill
State of North Carolina
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Broyhill,

International Paper Company would like you to take immediate action to relieve the RCRA requirement, which requires all wood preserving plants to have sudden and non-sudden liability insurance by November 8, 1985. Sudden and non-sudden liability insurance is not available in the market place to wood treaters and other TSD facilities due to the ongoing constrained insurance market.

EPA has been given no flexibility by Congress to grant waivers and thus EPA and other agencies will take strict enforcement against all TSD facilities that do not have the required insurance. Several wood treater plants have been named on a list EPA sent to Congress on 10-18-85 of sites that would be forced to shut down their TSD facilities on 11-8-85 due to lack of sudden and non-sudden liability insurance. Many other wood treater plants that cannot get the required insurance are not on the list but will be subject to TSD facilities closure on 11-8-85.

Your immediate response will be appreciated.

Sincerely,

Wayne E. Ryland
Plant Manager

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